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767
No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a
corporation,

Plaintiff in Error,

VS.

CALIFORNIA ADJUSTMENT COM-
PANY, a corporation,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

In Error to the United States District Court for the Northern
District of California, Second Division.

Filed

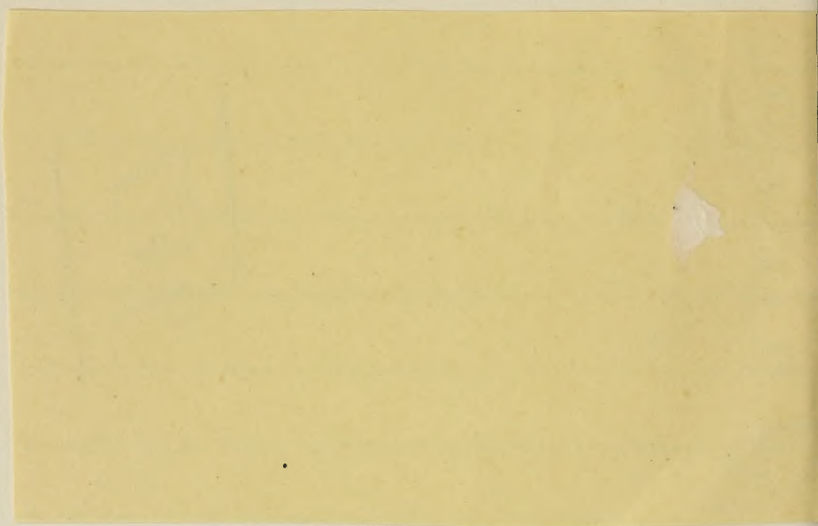
OCT 20 1915

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STATEMENT OF THE CASE

Southern Pacific Company, as plaintiff in error, brings a writ of error to reverse a judgment of the District Court of the United States for the Northern District of California, rendered against it, and in favor of the California Adjustment Company, defendant in error, for \$3,928.01.

The complaint is on the law side of the Court and consists of one hundred and twenty counts, each of

the counts being on a claim assigned to the defendant in error, all of them being the same in substance and form, and each of them alleging that the plaintiff in error operates a line of railroad between San Francisco and Los Angeles, which passes through various intermediate stations; that plaintiff's assignors sent various shipments over plaintiff's lines from San Francisco or Los Angeles to those intermediate points, and that they were charged a higher rate than the charge then made by defendant for transportation in the same direction on the same amount and class of property from the point of shipment to the City of Los Angeles or the City of San Francisco.

In each count the defendant sought to recover the difference between a greater charge for a short haul and a lesser charge for a long haul in the same direction, upon the theory that the difference between the greater charge for the short haul and the lesser charge for the long haul was an excessive charge, forbidden by the provisions of the Constitution of the State of California.

It should be said here that while this case is not in any sense a moot case, the amount dependent on the final determination of this case is greatly in excess of the amount represented by the judgment of the Court below. There are a number of cases pending in the California State Courts involving large claims against both the plaintiff in error herein and another railroad company. As in this case Federal questions are directly raised in addition

to the general questions, trial of the cases in the State Courts has been deferred in anticipation of securing in the present case an authoritative decision upon some or all of the questions involved. The Supreme Court of California has not passed upon the question of the right of the defendant in error, or those similarly situated, to recover on the facts presented by the present record, or on the facts involved in the cases pending in the State Courts.

Therefore, in view of the magnitude of the claims which are practically dependent upon the result of this case, and also in view of the fact that it may fairly be said that the questions now presented to this Court, so far as they relate to the California Constitution, are novel and uncontrolled by any decision of the Supreme Court of California, we must beg the indulgence of the Court if this statement and the following brief go somewhat into detail.

The one hundred and twenty counts embraced in the complaint fall naturally into two classes: *First*, counts upon so-called excessive charges collected prior to October 10, 1911, when Article XII of the California Constitution was amended, said article relating to the regulation of common carriers, and the powers and duties of the California Railroad Commission; *second*, counts upon so-called excessive charges collected after the amendments of October 10, 1911, to Article XII of the California Constitution. It is possible that this second class of counts may be subdivided into different periods, but that

will be a matter for subsequent treatment in this brief.

So that the Court may further fully understand the two subdivisions into which the one hundred and twenty counts naturally fall, we would state that, as to the first class, namely, those relating to shipments by railroad which moved and were delivered prior to October 10, 1911, there must be considered the following provisions of the California Constitution:

CALIFORNIA CONSTITUTIONAL PROVISIONS, 1879-OCTOBER 10, 1911.

Article XII, Section 21:

“No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same class of freight or passengers within this State, or coming from or going to any other State. Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Excursion and commutation tickets may be issued at special rates.”

Section 22:

“* * * Said Commissioners shall have the power, and it shall be their duty, to establish

rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such changes as they may make; to examine the books, records and papers of all railroad and other transportation companies, and for this purpose they shall have power to issue subpoenas and all other necessary process; to hear and determine complaints against railroad and other transportation companies; to send for persons and papers; to administer oaths, take testimony, and punish for contempt of their orders and processes, in the same manner and to the same extent as courts of record, and enforce their decisions and correct abuses through the medium of the courts. Said Commissioners shall prescribe a uniform system of accounts to be kept by all such corporations and companies. Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such Commissioners, or shall charge rates in excess thereof, or shall fail to keep their accounts in accordance with the system prescribed by the Commission, shall be fined not exceeding \$20,000 for each offense; and every officer, agent or employee of any such corporation or company, who shall demand or receive rates in excess thereof, or who shall in any manner violate the provisions of this section, shall be fined not exceeding \$5,000, or be imprisoned in the county jail not exceeding one

year. In all controversies, civil or criminal, the rates of fares and freights established by said Commission shall be deemed conclusively just and reasonable, and in any action against such corporation or company for damages sustained by charging excessive rates, the plaintiff, in addition to the actual damage, may, in the discretion of the judge or jury, recover exemplary damages. * * *"

Section 24:

"The Legislature shall pass all laws necessary for the enforcement of the provisions of this article."

As to the second class of claims involved herein, namely, those shipments which moved after October 10, 1911, there must be considered the following provisions of the California Constitution, as amended October 10, 1911:

Article XII, Section 21:

"No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this State. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the

shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution, such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. The Railroad Commission shall have power to authorize the issuance of excursion and commutation tickets at special rates. Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being excessive or discriminatory, provided no discrimination will result from such reparation."

Section 22:

"* * * Said Commission shall have the power to establish rates of charges for the transportation of passengers and freight by railroads and other transportation companies, and no railroad or other transportation company shall charge or demand or collect or receive a greater or less or different compensation for

such transportation of passengers or freight, or for any service in connection therewith, between the points named in any tariff of rates established by said Commission, than the rates, fares and charges which are specified in such tariff. * * *

“No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.

“The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the ‘Railroad Commission Act’ of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three Commissioners referred to in said Act shall be held and construed to be the five Commissioners provided for herein.”

As to the first class of claims—on shipments that moved prior to October 10, 1911—it was claimed by the defendant in error, and held by the District Court, that although the rates actually charged and collected by the plaintiff in error as a railroad carrier were rates which had been fixed by the California Railroad Commission under the provisions of the State Constitution, nevertheless, to the extent that such rates violated what was claimed to be a hard-and-fast long and short haul rule contained in Article XII, Section 21, as it existed up to October 10, 1911, the fact that such rates were Commission-made rates was no defense to an action for collection of the difference between them and the lesser charge for the greater distance.

As to the second class of claims it was claimed by the defendant in error and held by the District Court, that immediately on the taking effect of the constitutional amendment of October 10, 1911, all rates violative of the long and short haul clause contained in Section 21 of Article XII as then amended, no matter what might have been their previous status, immediately became illegal to the extent that the greater charge for the shorter distance exceeded the lesser charge for the greater distance, and that the carrier could not be relieved from this illegality unless it first filed a petition for such relief, and unless upon such petition an investigation was had by the California Commission and the extent prescribed to which the carrier might be relieved from the prohibition against charging less for the longer than for the shorter haul, and that, pending the

determination of such application, the rates existing on October 10, 1911, which were violative of the amended section 21, furnished ground of action for the collection of excessive rates in favor of anyone who paid such violative rates.

These contentions of the plaintiff below we hope to answer in the brief. The defendant below, plaintiff in error here, answered the complaint by denying the material allegations of each count (Answer, Record pp. 333-337), and also by pleading thirteen separate and further defenses. These defenses, which will be found in order beginning at page 337 of Volume II of the Record, were substantially as follows:

1 That, owing to the existence of water competition between San Francisco and Los Angeles, the rates between those two cities were forced down to lower than reasonable rates for the services performed, and that the rates between San Francisco or Los Angeles and the intermediate points were reasonable; that if they were forced down to the rates between the terminals defendant would be required to observe intermediate rates which would not afford it compensation for the service performed, thus depriving it of property without due process of law.

2 Section 21 of Article XII of the Constitution of California, as it existed from 1879 to October 10, 1911, violates the Federal Constitution in that it attempts to fix rates without a hearing, thereby depriving carriers of due process of law, and that, if

the plaintiff in error is required to refund to defendant in error the difference between the rates charged and the lower rate for the long haul, the effect of this section would be to have arbitrarily established forced and compelled rates as intermediate rates, without due process of law.

3 If Section 21 of Article XII of the California Constitution required delivery of goods mentioned in the complaint, at the intermediate points at charges exceeding the charges imposed for transporting the same property in the same direction to Los Angeles or San Francisco, it is in violation of the Federal Constitution, for the reason that, in denying to defendant the right to meet water competition which forces its rates between San Francisco and Los Angeles below a reasonable basis, it operates to deprive plaintiff in error of the equal protection of the law.

4 Upon all of the shipments mentioned in the complaint which moved prior to October 10, 1911, the rates assessed were established by the Railroad Commission, pursuant to Section 22 of Article XII of the California Constitution as it existed from 1879 to October 10, 1911, and were therefore conclusively just and reasonable.

5 The through rates between Los Angeles and San Francisco on the same kind and quality of property as those alleged to have been transported to intermediate stations were forced down and compelled by actual water competition between San Francisco and Los Angeles, and therefore property

transported to the intermediate points set forth in the complaint was not property of the same class as property of the same physical character and commercially called by the same name, on which the lower through rates applied between the two terminal points.

6 That neither defendant in error, nor any of its assignors, has ever applied to the Railroad Commission of California for an order of reparation respecting any of the shipments described in the complaint, as provided by Section 71, sub-sections "a" and "b", of the Public Utilities Act of California, approved December 23, 1911, and effective March 23, 1912 (Stat. 1911, c. 14), and for that reason each of the causes of action is barred by the provisions of the Public Utilities Act.

7 The Railroad Commission had authorized plaintiff in error, after investigation, to charge more for the shorter distance to the intermediate point than for the longer haul between San Francisco and Los Angeles, pursuant to the provisions of Section 21 of Article XII of the California Constitution as amended October 10, 1911.

8 The rates assessed and collected upon all shipments mentioned in the complaint, which moved or were delivered subsequent to October 10, 1911, had been established by the Railroad Commission prior to that date, and had not at the time of their collection been changed in any manner.

9 All of the shipments which moved prior to October 10, 1911, were subject to Section 40 of the

Act approved March 19, 1909 (Stat. 1909, c. 312), commonly known as the "Wright Act", providing that in all actions between private parties and transportation companies subject to the Act, with respect to any rate, the published rate shall be deemed to be just and reasonable, and shall not be open to controversy except under such proceedings before the Commission and in the Courts as are provided for in that Act; and it is alleged that the Commission had never acted on or with respect to the rates assessed upon these shipments.

10 That the shippers paid the freight charges upon each of said shipments without protest, believing it to be the lawful rate; and in each case this was the amount specified by the tariffs which had been established by the Railroad Commission as to shipments moving both prior and subsequent to October 10, 1911, and the amount so paid was in each case no greater than a reasonable compensation for the service performed.

11 Each of the rates charged and collected was, when and as charged and collected, a just and reasonable rate for the service performed.

12 The railroad over which the shipments referred to in the complaint were transported forms a part of a system operated by plaintiff in error, and which is used for the carriage of freight and passengers in intrastate and interstate commerce. The defendant in error relies for a recovery upon Section 21 of Article XII of the California Constitution, and particularly on the long and short haul

provision thereof. The effect of the application of this clause to California intrastate shipments between San Francisco and Los Angeles would operate unduly to burden and interfere with interstate commerce, by subjecting it to a lower rate than intrastate freight of the same class and character moving between Los Angeles and San Francisco under the same circumstances. This would result because the through rail rates between San Francisco and Los Angeles are water-compelled and lower than reasonable for the service performed, while the interstate rates upon the same commodities to and from Arizona and New Mexico points upon plaintiff's railroad system in, to and out of San Francisco and Los Angeles, are not affected by water competition, but are reasonable rates for the service performed, and therefore to apply the long and short haul clause between San Francisco and Los Angeles would subject interstate commerce to a greater burden than intrastate commerce of the same character between San Francisco and Los Angeles, which burden would be undue and unjust.

13 Neither plaintiff nor any of its assignors has suffered any pecuniary loss or damage as the direct result of any of the matters pleaded in the complaint.

To each of these separate defenses the defendant in error interposed a demurrer (Record, Vol. II, pp. 340-352), on the ground that it did not state facts sufficient to constitute a defense or a counterclaim.

The Court, by District Judge Van Fleet (Record, pp. 362-366), sustained the demurrer as to all of

the defenses except the seventh, which was the defense that as to the shipments which moved after October 10, 1911, the Railroad Commission of California had, after investigation, authorized the railroad to charge more for the shorter distance than for the longer distance in the same direction.

This was the situation of the pleadings when the action came on for trial before the Court without a jury on May 6, 1915.

The plaintiff in the Court below submitted no evidence, relying upon the admissions made by the answer, and on the elimination of the special defenses by the sustaining of its demurrer.

The defendant thereupon submitted a written motion for a nonsuit (pp. 369-371) upon the following grounds:

1 It was not shown that the so-called excessive charges exceeded by any sum whatsoever the charge then made for the transportation in the same direction of the same amount and class of property from the point of shipment referred to in the complaint to the more distant point from the point of delivery.

2 It did not appear that defendant had never been authorized by the Railroad Commission to charge less for longer than for shorter distances for the transportation of property, nor did it appear that defendant had not been authorized by the Commission with respect to the shipments involved in the complaint to charge less for the longer than for the shorter haul.

3 It was not shown that the Railroad Commission had never prescribed that defendant might in any case, or in any of the cases referred to in the complaint, be relieved from the prohibition of the long and short haul clause of the California Constitution.

4 It affirmatively appears from plaintiff's evidence, taken in connection with the admissions of the pleadings, that plaintiff's assignors paid, voluntarily and without protest, the amounts alleged to have been collected by defendant.

5 That plaintiff has failed to show that it or any of its assignors suffered any damage as a direct result of any of the matters set forth in the complaint.

The Court denied the motion, and thereupon defendant opened its case.

Evidence was offered by the plaintiff in error, defendant below, which was rejected by the Court, and which will be commented on later. The Court then gave judgment for the plaintiff below, as prayed for, and subsequently made special findings of fact (Record, p. 357), which findings in substance were as follows:

1 Defendant was not authorized by the Railroad Commission in any of the instances specified in the complaint to charge more for the shorter than for the longer haul.

2 It is not true that in the case of all or any of the shipments delivered after October 10, 1911, the

Railroad Commission had prescribed by order or otherwise that defendant might be relieved from the prohibition of the California Constitution against charging less for the longer than for the shorter haul.

3 It is not true that the property transported by defendant as alleged in the complaint was not property of the same class as that on which lower than through rates from Los Angeles to San Francisco were then being charged by defendant, but, on the contrary, the Court found that such property was in each instance property of the same class as that on which the lower through rates were charged.

These findings of fact were based upon the ruling of the Court on demurrer, hereinabove referred to, and upon the exclusion by the Court of certain evidence offered by the plaintiff in error, which evidence was addressed to the following questions:

1st Evidence to show that the rates charged and collected by the plaintiff in error, and claimed by the defendant in error to have been excessive, were, prior to October 10, 1911, rates which had been fixed, established and promulgated by the California Railroad Commission under the provisions of Article XII of the California Constitution of 1879, as it existed up to October 10, 1911.

2nd Evidence to show that the rates of the plaintiff in error existing on October 10, 1911, were rates which theretofore had been duly established, fixed and promulgated by the California Railroad Commission, and that those rates, by virtue of the con-

stitutional provisions which we have cited and which we will discuss in the brief, continued in effect after October 10, 1911, and until they were changed by the Commission.

3rd Evidence to show that after October 10, 1911, the Railroad Commission issued a series of orders requiring carriers to come in and file petitions for whatever relief they desired from the provisions of the long and short haul clause amendment of October 10, 1911, those orders granting, until determination by the Commission of the petitions, relief from the provisions of that section. These orders by the Commission were refused admission in evidence, on the ground that neither petition by the carrier nor investigation had preceded the making of such orders.

4th Evidence showing that as to all of the shipments involved in this action, which moved after October 10, 1911, the plaintiff in error had filed on December 30, 1911, petitions with the California Commission, pursuant to the orders next hereinabove referred to.

5th Evidence to show that the rates actually charged and collected were reasonable in and of themselves, in view of the service performed, and to show that the lesser rate for the greater distance was a rate compelled by water competition between the ports of San Francisco and Los Angeles. This evidence was excluded on the theory that it was immaterial and that the Court had disposed of those defenses by its ruling on demurrer.

We will now, under the appropriate heading, state to the Court a specification of the errors relied upon, which will include the substance of the evidence rejected.

SPECIFICATION OF ERRORS.

1 The Court erred in sustaining the demurrer of the defendant in error to the first separate defense of plaintiff in error, which first separate defense is set forth in full on page 337 of the printed record.

2 The Court erred in sustaining the demurrer of defendant in error to the second separate defense of plaintiff in error, which second separate defense is set forth in full on page 339 of the printed record.

3 The Court erred in sustaining the demurrer of defendant in error to the third separate defense of plaintiff in error, which third separate defense is set forth in full on page 339 of the record.

4 The Court erred in sustaining the demurrer of defendant in error to the fourth separate defense of plaintiff in error, which fourth separate defense is set forth in full on page 340 of the record.

5 The Court erred in sustaining the demurrer of defendant in error to the fifth separate defense of plaintiff in error, which fifth separate defense is set forth in full on page 340 of the record.

6 The Court erred in sustaining the demurrer of defendant in error to the sixth separate defense of plaintiff in error, which sixth separate defense is set forth in full on page 341 of the record.

7 The Court erred in sustaining the demurrer of defendant in error to the eighth separate defense of plaintiff in error, which eighth separate defense is set forth in full on page 343 of the record.

8 The Court erred in sustaining the demurrer of defendant in error to the ninth separate defense of plaintiff in error, which ninth separate defense is set forth in full on page 343 of the record.

9 The Court erred in sustaining the demurrer of defendant in error to the tenth separate defense of plaintiff in error, which tenth separate defense is set forth in full on page 344 of the record.

10 The Court erred in sustaining the demurrer of defendant in error to the eleventh separate defense of plaintiff in error, which eleventh separate defense is set forth in full on page 345 of the record.

11 The Court erred in sustaining the demurrer of defendant in error to the twelfth separate defense of plaintiff in error, which twelfth separate defense is set forth in full on page 345 of the record.

12 The Court erred in sustaining the demurrer of defendant in error to the thirteenth separate defense of plaintiff in error, which thirteenth separate defense is set forth in full on page 346 of the record.

13 The Court erred in denying the motion for nonsuit.

14 The Court erred in sustaining the objection of the defendant in error to the introduction in evidence by the plaintiff in error of a certified copy of

an order and decision of the Railroad Commission of the State of California, dated May 20, 1910, and made and entered in Case No. 110, entitled "Associated Jobbers of Los Angeles, Complainant, vs. Southern Pacific Company et al., Defendants," which order is set forth on pages 382 et seq. of the printed record, and was an order of the California Railroad Commission fixing the rates shown in column 10 of defendant's Exhibit A (Record, pp. 377-8) as rates fixed by the California Railroad Commission's Case No. 110, and so testified to by witness Reinhart (Record, p. 379), the rates so fixed by said order covering in part the rates collected alleged to have been excessive.

15 The Court erred in sustaining the objection of the defendant in error to the offer of the plaintiff in error of the notice by the Railroad Commission of the State of California in its Case No. 214, entitled "In the Matter of the Provisions of Section 21 of Article XII of the Constitution of California, Relating to Long and Short Hauls, and other Rates Exceeding the Aggregate of Intermediate Rates," which notice was dated October 26, 1911, and is set forth at pages 399 et seq. of the printed record. Said notice so issued by the Railroad Commission of the State of California, ordered railroad and other transportation companies to present to the Commission, on or before January 2, 1912, for examination and investigation by the Commission, a new schedule or schedules removing deviations from the long and short haul clause from the provisions of said section of the Constitution, or, in case it was

desired to justify the same, an application to be relieved from the provisions of said section—forms of said application being contained in said notice.

16 The Court erred in sustaining the objection of the defendant in error to the order of said Railroad Commission offered by plaintiff in error, dated November 20, 1911, which said order is set forth beginning at page 404 of the printed record, and which said order grants permission to railroads and other transportation companies until January 2, 1912, to file for establishment with the Commission, in the manner prescribed by law, “and in accordance with the Commission’s regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate basis or adjudgments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911.”

17 The Court erred in sustaining the objection of the defendant in error to the offer of plaintiff in error of certified copies of Southern Pacific Company’s petitions Nos. 3, 9, 10, 30 and 40, addressed to the Railroad Commission of the State of California, praying for relief from the provisions of Section 21 of Article XII of the California Constitution, as amended October 10, 1911, with respect to the rates specified in those petitions, said rates including all of the rates collected by the plaintiff in error and made the subject of suit herein in the respective counts of the defendant in error in the

complaint filed in the Court below. Said petitions were filed on December 30, 1911, pursuant to the order next hereinabove referred to made by the said Railroad Commission on November 20, 1911, and the said notice by the Railroad Commission, dated October 26, 1911. Each of said petitions prays for authority for said Southern Pacific Company to continue, for itself and its participating carriers, rates for the transportation of property as described in said petition higher for like kinds of property for the shorter than for the longer distance over the same line or road, in the same direction, as described in said respective petitions. Said petitions Nos. 3, 9, 10, 30 and 40 are printed seriatim, beginning at page 407, and extending to page 422 of the printed record.

18 The Court erred in sustaining the objection of the defendant in error to the offer by the plaintiff in error of a copy of the minutes of the California Railroad Commission of January 2, 1912, said offer, together with the stipulations relating thereto, being printed, beginning at page 423 of the record. Said minutes showed that Case No. 214 before said California Railroad Commission, relative to the provisions of Section 21 of Article XII of the California Constitution, relating to long and short hauls, etc., came on for hearing before the Commission on January 2, 1912, and that after a discussion of the case the meeting was adjourned. The evidence showed that the case is pending.

19 The Court erred in sustaining the objection of the defendant in error to the introduction in evi-

dence by plaintiff in error of an order of the Railroad Commission of the State of California, dated January 16, 1912, made and entered in said Case No. 214, a copy of which order is printed in the record, beginning at page 425. Said order provided, in substance, that until February 15, 1912, the railroad and other transportation companies might file for establishment with the Commission, in the manner prescribed by law, and in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments higher fares or rates at intermediate points, provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911.

20 The Court erred in sustaining the objection of the defendant in error to the offer by the plaintiff in error of a certified copy of the decision of said California Railroad Commission, dated March 28, 1912, made and entered in Case No. 116 before said Commission, which said order is printed in the record, beginning at page 428, and which said order fixes as of April 3, 1915, certain rates which were collected and are sued on herein.

21 The Court erred in sustaining the objection of the defendant in error to a question propounded by the plaintiff in error to the witness F. W. Gompf, which question was as to whether the letter mentioned in the next succeeding assignment of error herein was a correct copy of the letter sent to the

California Railroad Commission by the Southern Pacific Company through the agency of the witness, transmitting the tariffs therein specified, and whether those tariffs were filed with the Commission.

22 The Court erred in sustaining the objection of the defendant in error to the letter offered by the plaintiff in error, addressed to the Board of Railroad Commissioners of the State of California at San Francisco by the Southern Pacific Company, dated May 7, 1909, a copy of which letter, with the list of tariffs therein referred to, is printed in the record, beginning at page 434. Said letter transmitted certain tariffs to said Railroad Commission, which said tariffs are enumerated in the list attached to said letter, and said letter bore the endorsement that it was received on May 8, 1909, by the Secretary of the California Railroad Commission.

23 The Court erred in sustaining the objection of the defendant in error to the offer by the plaintiff in error to show by the witness Gomph that all of the tariffs of said Southern Pacific Company relative to the movement of freight in California were actually filed with and remained on file with the Railroad Commission of California until the Commission entered an order on June 11, 1909, approving the tariffs on file.

24 The Court erred in sustaining the objection of the defendant in error to the offer by plaintiff in error of the order made by the Railroad Commission of the State of California dated June 11, 1909, approving the rates, fares and charges of the car-

riers named in said order, which said order is printed in the record, beginning at page 445, and which said order recites that certain carriers, including the Southern Pacific Company, have filed with the Commission a printed copy of schedules showing their rates, fares and charges for transportation of freight and passengers within California, and that "the aforesaid schedules be and they are hereby received and filed by this Commission as the rates, fares and charges * * * * which have been made and filed by said carriers respectively * * * and that the said rates, fares and charges shall be published by said carriers respectively, as required by the said Act, and shall be the lawful rates, fares and charges of said carriers respectively * * *"

25 The Court erred in sustaining the objection of the defendant in error to an offer by plaintiff in error to show (Record p. 448) by witness J. K. Butler, Assistant General Freight Agent of plaintiff in error, that in his opinion as a freight traffic man the rates charged plaintiff's assignors were reasonable in and of themselves for the services performed, and furthermore that the through rate which is contended for here was a rate less than a reasonable rate in and of itself for the service to be performed under the through rate, and was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles.

26 The Court erred in holding and deciding in its special findings of fact that it was not true, as alleged in paragraph 4 of defendant's answer, that

in each or any instance stated in the complaint where, for the transportation of property, defendant charged more for the shorter than for the longer distance in the same direction of the same kind and class of property, defendant had been so authorized to do by the Railroad Commission of the State of California.

27 The Court erred in holding and deciding in its special findings of fact that it is not true, as alleged in paragraph V of defendant's answer, that in the case of all or any of the shipments described in the complaint as having moved or having been delivered after October 10, 1911, the Railroad Commission of California had prescribed, by order or otherwise, that the defendant might be relieved from the prohibition of the Constitution of the State of California against charging less for the longer than for the shorter haul, nor that it was true that, as alleged in defendant's seventh further and separate defense in its answer, that as to each and all of such shipments moving after October 10, 1911, said Railroad Commission had authorized defendant, after investigation or at all, to charge more for the shorter distance to the point between San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction.

28 The Court erred in holding and deciding in its special findings of fact that it is not true, as alleged in paragraph III of defendant's answer, that the property transported by defendant, as

alleged in each of the separately stated causes of action, was not property of the same class as the property on which lower through rates from Los Angeles to San Francisco were then being charged by defendant.

29 The Court erred in rendering judgment against defendant instead of in favor of this plaintiff in error and against said defendant in error.

Each of said rulings of said Court hereinabove assigned and specified as errors relied upon, were specifically excepted to by plaintiff in error.

BRIEF OF THE ARGUMENT.

The points of law involved, all of which were decided adversely to plaintiff in error by the Court below, and which said points are relied upon for a reversal of the judgment herein, are as follows:

I.

Section 21 of Article XII of the California Constitution as it existed from 1879 to October 10, 1911, and which contains the so-called long and short haul clause upon which the first general class of cases sued on herein is founded, is invalid because in terms it attempts to regulate interstate commerce, and the attempt so to regulate interstate commerce is so intermingled with and inseparable from the other provisions that it cannot be presumed that the section would have been adopted if the invalidity of the portion thereof attempting to regulate interstate commerce had been known, and that therefore, under familiar rules of construction, the whole section falls.

The first general class of cases embraced in the complaint are those wherein defendant in error sought to recover upon the theory that, although the Railroad Commission of the State of California, pursuant to Section 22 of Article XII of the California Constitution as it existed until October 10, 1911, had established the rates of charges actually collected by the plaintiff in error on the shipments involved, nevertheless if such rates of charges exceeded the rates of charges established by the Commission for the same class of property in the same direction to a more distant station, port or landing, the higher intermediate rate so fixed by the Commission was an illegal rate, and the railroad was obligated not to collect more than the lesser charge to the more distant point.

That the Commission prior to October 10, 1911, had established the rates to the intermediate point—that is, the rates actually collected—was specifically pleaded as to the charges collected prior to October 10, 1911, by the fourth separate defense (Record p. 340), and as to the charges collected after October 10, 1911, by the eighth further and separate defense (Record, p. 343), to each of which a general demurrer, as hereinbefore shown, was sustained by the Court. That the Commission actually did establish such rates as the rates which should be charged to the intermediate point, the plaintiff in error endeavored to show by the offer of the order of the California Railroad Commission in its case No. 110, which was excluded by the Court (Record p. 381, Exception No. 3), and by endeavor-

ing to show by the witness Gomph (Record p. 433) that the Commission had established such rates prior to October 10, 1911, and that the fares so established were in conflict with the long and short haul clause of the California Constitution as it stood up to October 10, 1911 (Record p. 433).

The evidence offered and excluded was, *first*, a letter from the Freight Traffic Manager of the Southern Pacific Company (Record p. 434), transmitting the tariffs therein specified to the Railroad Commission, and *second*, an offer to show by witness Gomph that all of the tariffs of the Southern Pacific Company relative to the movement of freight in California were actually filed and remained with the California Railroad Commission until the Commission entered an order on June 11, 1909, establishing the tariffs on file with it as the lawful rates and fares (Gomph's testimony, Record, p. 444), and *third*, the defendant's offer of a certified copy of the order of the Railroad Commission, dated June 11, 1909, approving the rates, fares and charges of the carriers named in the order, and establishing them as lawful rates, fares and charges (Record p. 444).

The offers so made were further tied to the respective counts of the complaint by the admission in evidence of defendant's Exhibit A, beginning at page 376 of the printed record, which shows in column 10 the tariff numbers of the tariffs upon which the charges were collected, and in column 14 the tariff numbers of the tariffs showing the rate effec-

tive if the through tariff should have been observed to the more distant point, as contended for by defendant in error.

It cannot be questioned, therefore, that the record is complete on the subject that the plaintiff in error endeavored to show that the rates actually charged and collected, and upon which defendant in error bases its demand, were rates established by the Railroad Commission of the State of California. It would follow that if Section 21 of Article XII is void for the reasons stated in the italicised heading to this subdivision of the brief, the trial Court not only should not have sustained the demurrer of the defendant in error to the separate defenses of the plaintiff in error Numbers Four and Eight, specifically pleading the establishment of tariffs by the Railroad Commission, but also that the Court below should not have excluded the evidence showing that the rates collected were rates actually established by the California Commission prior to October 10, 1911, and that the Commission had also, in the same manner, established lesser rates for the greater distance.

The invalidity of Section 21 of Article XII of the California Constitution of 1879 will be apparent, we believe, from a mere reading of the provisions of the section, in that the section expressly endeavors to regulate rates charged by California carriers, no matter whether such rates relate to interstate or intrastate movements. The section begins by prohibiting discrimination in charges for transportation be-

tween places or persons "within this State, or coming from or going to any other State," and then provides that property transported over a railroad "shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class in the same direction, to any more distant station, port or landing."

The section therefore is one prohibiting discrimination, and it seems perfectly clear that the framer of the section had in mind the protection of places and persons in California against discrimination by a railroad, no matter whether such discrimination consisted in the application of interstate rates or in the application of intrastate rates, or a combination of both.

It will be remembered that at the time of the adoption of this section the Central Pacific line had been constructed. It is apparent that it was the intention of the framer of the section to prohibit a lesser rate for a longer distance on the line of a railroad between Oakland and Reno, as well as to prohibit the same form of discrimination between Oakland and Sacramento. It requires no extended citation of authorities to the point that Congress, under the Commerce Clause, is supreme with respect to interstate and foreign commerce, and that whenever it does act with respect to interstate or foreign commerce it completely occupies the field to the exclusion of state legislation, leaving no twilight zone or border land within which the State may exercise

jurisdiction. This is clearly pointed out by the United States Supreme Court in the recent decision in *Erie Railroad Company vs. State of New York*, 233 U. S. 671.

The first Employers' Liability cases, 207 U. S. 463, illustrate the disposition of the Federal courts to preserve the division of power between the Federal and the State governments, and also to hold that when a congressional enactment under the Commerce Clause is so framed that it cannot be said that Congress would have enacted the legislation if its invalidity as to a portion of the field attempted to be covered had been known or apprehended, the whole legislative enactment will fail. The case is peculiarly applicable here, since a State constitutional provision, when it comes in conflict with a provision of the United States Constitution or with Federal legislation enacted thereunder, is of no more sanctity or validity than an Act of the State Legislature.

In the Employers' Liability cases, 207 U. S. 463, there was considered by the Court the constitutionality of an Act of Congress under the Commerce Clause, which was known as the Federal Employers' Liability Act of July 11, 1906. (32 Stat. 232). The Court held that this Act applied to all common carriers engaged in interstate commerce, and that it imposed a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees might have been engaged at the time of the injury, and therefore that of necessity it included

subjects wholly outside of the power of Congress to regulate commerce (207 U. S. 498); and the Court said that as the Act thus included many subjects wholly beyond the power of Congress to regulate commerce, but dependent for its sanction upon that power, therefore "It results that the Act is repugnant to the Constitution and cannot be enforced unless there be merit in the propositions advanced to show that the statute may be saved."

It was argued that, so far as the face of the statute was concerned, it in terms applied only to carriers engaged in commerce between the States, and that therefore it should be interpreted as being exclusively applicable to the interstate business, and no other, of such carriers, and that the words "any employee" as found in the statute should be held to mean any employee when such employee was engaged only in interstate commerce. The Court said:

"But this would require us to write into the statute words of limitation and restriction not found in it * * * To write into the Act the qualifying words therefore would be but adding to its provisions another to save it in one aspect and thereby to destroy it in another—that is, to destroy in order to save, and to save in order to destroy."

The Court then said:

"The principles of construction invoked are undoubted, but are inapplicable. Of course if it can lawfully be done, our duty is to construe the statute so as to render it constitutional. But

this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional, and others which are not, effect may be given to the legal provisions by separating them from the illegal. *But this applies only to a case where the provisions are separable and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated.* All these principles are so clearly settled as not to be open to controversy. They were all, after a full review of the authorities, restated and reapplied in a recent case. *Illinois Central Railroad vs. McKendree*, 203 U. S. 514, and authorities there cited."

The Court, after further discussion, concluded:

"That the statute, whilst it embraces subjects within the authority of Congress to regulate commerce, also includes subjects not within its constitutional power, and that the two are so interblended in the statute that they are incapable of separation."

In the case of *Baldwin vs. Franks*, 120 U. S. 678, it was said by the Court on page 685 that to give

effect to the well-settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the constitutional part may be enforced and only that which is unconstitutional rejected,

“The parts (that which is constitutional and that which is unconstitutional) must be capable of separation so that each may be read by itself
* * * The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.”

In the Virginia Coupon cases (*Poindexter vs. Greenhow*, 114 U. S. 270) it was said by the Court, respecting certain acts of the Assembly relative to taxation, and as to which a portion concededly violated the Federal Constitution by impairing the obligation of a contract, that the vice which invalidated the Acts pervaded them throughout and in all of their provisions, and (page 304): “The scheme of the whole is indivisible. It cannot be separated into parts; it must stand or fall together. * * *”

After referring to cases:

“These are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law in-

tended by the Legislature one they may never have been willing by itself to enact.”

The Court then refers to the Trade Mark Cases (100 U. S. 82), and cites with approval the language of the Court in that case at page 99, that:

“If in the case before us we should undertake to make by a judicial construction a law which Congress did not make itself, quite probably we should do what, if the matter were now before that body, it would be unwilling to do.”

Particularly applicable to the case at bar is the language of the Court in *United States vs. Reese*, 92 U. S. 214, where the Court, in construing a case arising in Kentucky under the Fifteenth Amendment, says, with regard to the provisions of a Federal penal statute intended to carry the provisions of that amendment into effect:

“We are therefore directly called upon to decide whether a penal statute enacted by Congress * * * can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute first. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the sec-

tion, but by inserting those that are not now there. * * * The question then to be determined is whether we can introduce words of limitation into a penal statute, so as to make it specific, when, as expressed, it is general only. * * * To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In the case at bar, therefore, to give effect to any contention that may be made that the old Section 21, Article XII, California Constitution, is to be construed as referring only to movements beginning and ending within the State, and as to a comparison of the rates charged for these movements with rates to more distant points within the State, this Court would necessarily have to read into the second sentence of Section 21 appropriate words of limitation, which, from the first sentence of the section, were not in the minds of those who drafted or adopted the section, *and which in any event would be an addition to and not an elimination from the language of the second sentence of Section 21.*

It may be claimed by defendant in error that Section 21 of Article XII of the California Constitution of 1879 is separable as respects the three sentences constituting the section, and that even though the first sentence be vulnerable to attack on the ground that it is a palpable effort to regulate interstate commerce, the second sentence is not subject to the same objection, and therefore that the second sen-

tence may be given the construction contended for here by the defendant in error and upheld by the learned District Judge, to the effect that it is a mandatory prohibitory clause of the Constitution, regulating the rates to be fixed by the State Commission under the succeeding Section 22. We think the section should be considered as an entirety, as an effort to forbid discrimination, but if it be susceptible of division into sentences, the vice remains in the second sentence.

A consideration of the second sentence of Section 21, in the light of the Federal decisions relative to interference with interstate commerce, will show that the idea of regulation of interstate commerce is so interwoven with what, under some views of the decisions, the State might do in regulating intrastate commerce under the long and short haul principle, that the illegal part is inseparably mingled with the part which merely, for the sake of the argument, may now be conceded to be legal—that is, the adoption of the long and short haul principle as applied to commerce beginning and ending entirely within the limits of the State of California, with a relieving power somewhere.

The second sentence reads:

“Persons and property transported over any railroad or by any other transportation company or individual shipper shall be delivered at *any station*, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class in the

same direction to *any more distant station*, port or landing."

It will thus be seen that if the carrier had in effect a rate say of 50 cents per hundred pounds on a given commodity from Oakland to Sacramento, and at the same time had a rate, either voluntarily established or *compelled by Federal authority*, of 20 cents per hundred pounds for the same commodity over the same line or route from Oakland to Reno, the 50-cent charge would immediately and automatically, assuming the validity of the sentence just quoted, become invalid under the specific provisions of that sentence to the extent that it exceeded the 20-cent rate, because it would be a charge in the same direction and would be a charge to a more distant station. And this despite the fact that California has not and has never had the right to fix the rate from Oakland to Reno.

Illustrative of this principle and of the inseparability of such provisions, is the case of *Wabash, St. Louis & Pacific Railway Company vs. Illinois*, 118 U. S. 557; 30 Lawyers' Ed. 244. In that case the Illinois statute provided that if a railroad corporation charged for transportation "for any distance within the State" the same or a greater amount than at the same time was charged for the transportation in the same direction of the same class of property "over a greater distance on the same road," such discriminatory rate should be taken as *prima facie* evidence of unjust discrimination, prohibited by the provisions of the Act. The statute provided a pen-

alty recoverable by the State, and also specifically gave the party aggrieved the right to recover three times the amount of damages sustained, etc.

The Supreme Court of Illinois held that while the statute was inoperative upon that part of the contract which had reference to the transportation outside of the State, it was binding and effectual as to so much of the transportation as was within the limits of the State (*People vs. Wabash, etc., Ry. Co.*, 104 Ill. 476), and the United States Supreme Court said (118 U. S. 564):

“If the Illinois statute could be considered to apply *exclusively* to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid.”

The Court then said that it might admit of question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which was purely intrastate, but that the Supreme Court of Illinois having given the aforesaid interpretation to the statute, the Supreme Court was bound to accept that construction. Therefore, treating the section as an entirety, it was held, after an exhaustive discussion by the Court and a citation of the cases in point, to be invalid as a palpable effort to interfere with, or at least to regulate, interstate commerce. And so the whole section fell to the ground.

The latest case on this question we have been able to find is that of *Sargent, Attorney-General, vs. Rutland Railroad Company*, 86 Vt. 328; 85 Atl. 654, decided by the Supreme Court of Vermont in 1913. In that case the Vermont statute provided that the railroad should not charge, collect or receive "any demurrage charge on freight received at any station in this State" until four days after notification of the consignee; and another statute also provided that no railroad company doing business in Vermont should charge any demurrage upon any car "placed or held for loading in this State," until four days after notification to the consignor. The Public Service Commission construed the law of these sections as pertaining only to commerce wholly within the State, and its order in the premises was limited accordingly. This construction the Attorney-General said was as it should be, for otherwise the law might be subject to constitutional objections, and a statute is not to be construed, so he said, so as to be unconstitutional, if a reasonable construction can be placed upon it which will give its provisions constitutional effect. The reply to this was that the statute in terms applied to interstate commerce as well as intrastate commerce, and that the two elements are inseparable, and that since the valid portion cannot be separated from the invalid the principle of construction contended for by the Attorney-General did not apply. The Court said:

"It is true, as argued, that the fact that a part of a statute is in violation of the Constitution, does not authorize courts to declare the whole

statute void, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that they are not severable, or it cannot be presumed the Legislature would have passed the valid part without the other. If the invalid portion can be eliminated, and that which remains be complete in itself and capable of being executed in accordance with the apparent intent of the Legislature, wholly independent of the eliminated portion, it must be sustained. *State vs. Scampini*, 77 Vt. 92, 59 Atl. 201; *State vs. Abraham*, 78 Vt. 53, 61 Atl. 766; *State vs. Paige*, 78 Vt. 286, 62 Atl. 1017, 6 Ann. Cas. 725; *Howard vs. Illinois Central R. Co.*, 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. 141. But when, as here, the provisions of the statute are clothed in plain language, and unambiguous, there is no room for construction. The effect is not to be determined on the basis of striking out or disregarding some of the words in the statute, nor by inserting others not there. It is not within the judicial province to give the words used a broader or a narrower meaning than they were manifestly intended to have, in order to bring the scope of the statute within the constitutional power of the Legislature to enact. *United States vs. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States vs. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. 601; *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Baldwin vs. Franks*, 120

U. S. 678, 30 L. ed. 766, 7 Sup. Ct. 656; *James vs. Bowman*, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. 678.

In *United States vs. Ju Yoy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. 644, questions were before the court based upon the Chinese Exclusion Acts. After stating that the Act purports to make the decision of the department final, whatever the ground on which the right to enter this country is claimed, as well when it is citizenship as when it is domicile, and the belonging to a class excepted from the exclusion acts; that the relevant portion of the Act of August, 1894, was not void as a whole, and that the statute had been upheld and enforced, the court, through Mr. Justice Holmes, said: 'But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again.'

In *Howard vs. Illinois Central R. Co.*, 207 U. S. 463, 52 L. ed 297, 28 Sup. Ct. 141, the question of the validity of the Federal Employers' Liability Act was involved. By Section 1, 'Every common carrier engaged in trade or commerce in the District of Columbia, or in any territory of the United States, or between

the several states, * * * shall be liable to any of its employees, * * * for all damages which may result from the negligence of any of its officers, agents or employees, * * * ,

The questions raised concerned the nature and extent of the power of Congress to regulate commerce, it being contended, among other things, that the repugnancy of the act of the Constitution clearly appeared, as the face of the act made it certain that the power asserted extended not only to the regulation of master and servant among themselves as to things which were wholly interstate commerce, but embraced those relations as to matters and things domestic in character, and not coming within the authority of Congress. The court, Mr. Justice White, now the Chief Justice, delivering the opinion, said that from the first section it was certain that the act extended to every individual or corporation engaged in interstate commerce as a common carrier; that its all-embracing words left no room for any other conclusion; that the statute was addressed to the individuals or corporations engaged in interstate commerce, but was not confined solely to regulating the interstate commerce business which might be done by such persons or corporations; that the liability of a common carrier was declared to be in favor of 'any of its employees'; that as the word 'any' was unqualified, it followed that the liability to the servant was coextensive with the business done by the employers embraced by the statute,

the court instancing a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state. It was held that as the act included subjects wholly beyond the power to regulate commerce, and depended for its sanction upon that authority, it was unconstitutional and could not be enforced unless there was merit in the propositions advanced to show that the statute might be saved. None of the propositions to which allusion is made was sustained, but we are here interested more particularly in the one that the statute might be interpreted so as to confine its operation wholly to interstate commerce, or to means appropriate to the regulation of that subject. Thereon the court said the argument that because the statute says carriers engaged in commerce between the states, etc., therefore the act should be interpreted as being exclusively applicable to the interstate commerce business, and none other, of such carriers, and the words 'any employee' as found in the statute, should be held to mean any employee when engaged only in interstate commerce, required the court to read into the statute words of limitation and restriction not found in it. To quote from the opinion, 'The principles of construction invoked are undoubtedly, but are inapplicable. Of course if it can be lawfully done, our duty is to construe the statute so as to render it constitutional. But this does not imply, if the text of an act is unambiguous, that it may be rewritten to accomplish

that purpose. Equally clear is it, generally speaking, that where a statute contains provisions which are constitutional, and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save, the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated. All these principles are so clearly settled as not to be open to controversy.' It was further held that since the act, by its terms, related to every common carrier engaged in interstate commerce, and to any of the employees of every such common carrier, the court was unable to say that the statute would have been enacted had its provisions been restricted to the limited relations of that character which it was within the power of Congress to regulate. *Although the questions involved in this and in the preceding case noticed were based upon Federal statutes in terms overreaching congressional power, and not upon state enactments extending beyond state control, as in the case at bar, the governing principles of construction are the same.* Other cases illustrative of this point are, Louisville & Nashville R. Co. vs.

Centran Stock Yards Co., 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. 246; and Illinois Central R. Co. vs. McKendree, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. 153.”

We respectfully but earnestly submit, therefore, that either taking Section 21 of Article XII of the Constitution of 1879 in its entirety, or taking the second sentence thereof, the section itself, or either sentence thereof, plainly constitutes an effort on the part of the State of California at least to prescribe that no railroad within the State shall charge more for a shipment originating within the State and destined to a point within the State, than it does for a similar shipment in the same direction destined to a point without the State. We say that it at least has that effect, though in terms it goes farther. It has, we think, the unquestionable effect of attempting to provide that the long and short haul principle shall be applied to all shipments originating or terminating within the State; that is to say, that an interstate railroad operating in California, with its western terminus therein, would infringe the provisions of the section by charging more for a shipment from, say Oakland, to Reno than it charged for a similar shipment from Oakland to Ogden, or by charging more for a shipment from Sacramento to Oakland than for a similar shipment from Reno to Oakland. The language employed is apt, comprehensive and unmistakable. It is familiar learning that the Commerce Clause was designed to prevent States from damming the flow of commerce across their borders; that to the Federal government was by the

Commerce Clause secured the sole authority to regulate freedom and uniformity of commerce among the States. How studiously the Federal courts have protected this national asset is strikingly shown by the recent Shreveport case, 234 U. S. 342, wherein the attempt of one State ingeniously to discriminate against commerce from another was summarily set at naught.

It will not do for defendant in error to answer this conclusion by saying that at the time the Constitution of 1879 was adopted Congress had not passed the Interstate Commerce Act and had not attempted to regulate rates and prohibit discrimination as to interstate and foreign commerce. The fact remains that it has since done so, and that, having entered the field of regulation of interstate rates and prohibition of discrimination as to interstate shipments, it has completely occupied that field, to the exclusion of any State interference therewith, and that any State legislation which is so framed that it attempts to encroach upon the congressional domain, and wherein such attempt is so interwoven with what the State might lawfully do that the two cannot be separated, will necessarily be declared invalid. A dormant National power cannot be foreclosed by State action. Witness the United States Bankruptcy Act.

It must be recalled also that all of the shipments forming the subject of the one hundred and twenty causes of action herein moved within two years prior to the date of the filing of the complaint on January

14, 1913, and at a time after the amendment to the long and short haul clause of the Act to Regulate Commerce (June, 1910), and after the regulation of interstate commerce by Congress under the Commerce Clause had taken full force and effect.

An interesting and recent case on the question of the inseparability of the provisions of a statute which attempts to regulate both interstate and intrastate commerce is that of *Erie R. R. Co. v. New York*, 233 U. S. 671, which reversed the judgment of the New York Court of Appeals in *People vs. Erie R. R. Co.*, 198 N. Y. 369. The New York statute under consideration is printed as a foot-note to page 675 of 233 U. S. It attempted to regulate the hours of labor of block system, telegraph and telephone operators and signal men on surface, sub-way and elevated railroads. After describing the kinds of labor intended to be covered by the act, it said: "It is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid."

At the same time there was in existence the familiar Federal Hours of Service Act, passed by Congress under the commerce clause, which fixed the hours of labor of telegraph and telephone operators engaged in interstate commerce at nine hours per day. It was thought by the New York Court of Appeals and so decided that the eight hour provision in the New York statute might be sustained even as to operators handling interstate trains on the theory that the State had merely supplemented an

action of the Federal authorities, and had raised the limit of safety; and also that the form of the Federal statute, "although not expressly legalizing employment up to that limit, seems to have invited and to have left the subject open for supplementing said legislation if necessary." Said the United States Supreme Court in reversing the judgment:

"We realize the strength of these observations, but they put out of view, we think, the ground of decision of the cases, and, indeed, the necessary condition of the supremacy of the congressional power. It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.

"Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads."

The Court then, on page 685 of 233 U. S., quotes, apparently with approval, the language of the New York Court of Appeals, on page 376 of 198 N. Y.

"That the Labor Law purports and attempts indiscriminately and inseparably to regulate the hours of the classes of employees designated whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the legislature over the former."

We submit that Section 21 of Article 12 of the California Constitution of 1879 is much more vul-

nerable to attack on the ground that it attempts to regulate interstate commerce, than are the New York statutes just referred to, in as much as the California section in its first sentence in terms prohibits discrimination against persons, passengers or freight "within the State or going to or coming from other States." It may be noted at this point that when the people came to adopt an amendment to Section 21 of the California Constitution, on October 10, 1911, the invalidity of the Section was observed and, the amended section prohibits discrimination in charges or facilities merely "for the transportation of the same class of freight or passengers within this State," and as the so-called long and short haul principle is concededly directed against a particular form of discrimination, it is, we think, quite clear that the amended Section 21 endeavored to and did confine its operation merely to California intrastate movements. This view is strengthened by the proviso in Section 21 that the California Railroad Commission may authorize the charging of less for longer than for shorter distances. Of course, taking the section as a whole, it is apparent that there was no idea on the part of the framers of the section that the Commission therein referred to had any power to grant relief as to interstate rates, such relief being covered by the amended Section Four of the Act to Regulate Commerce. But taking the old Section 21 as a whole, it is equally clear that the framer intended to regulate interstate as well as intrastate charges.

We submit, therefore, that in the light of the foregoing decisions there is no reasonable ground for a judicial declaration that the people of the State of California would have adopted the constitutional provision now under consideration if they had known that it would be void as to interstate commerce and that railroads might continue to exercise this form of discrimination as to interstate commerce, untrammelled by any regulation, save that which Congress saw fit to authorize.

It must be remembered that at the time the California Constitution of 1879 was adopted we had no Interstate Commerce Act, and that the long and short haul provision of the Interstate Commerce Act was originally enacted in 1887 and amended in 1910. It may be argued by defendant in error that at the time the California Constitution of 1879 was adopted Congress had not entered the field of rate regulation or of legislation against the form of discrimination prohibited by the long and short haul clause, and therefore that it was competent for the State to act. Yet even if the incorrect assumption be made that the State in 1879 could regulate interstate commerce, it seems to us that the suggested argument is susceptible of two answers: *first*, that it cannot be presumed that the people would have adopted a section of the Constitution which attempted to regulate interstate commerce, knowing that the moment Congress acted with respect to that particular form of discrimination a vital and inseparable part of the section would immediately be abrogated; and, *second*, that when Congress did act, thus abrogating a vital

part of the section—a part inseparable from the other provisions—the whole section, because of this inseparability, falls to the ground.

Thus far on this branch of the argument we have referred merely to the first general class of claims, those arising prior to October 10, 1911, but it would follow necessarily that if Section 21 of Article XII as it stood on October 10, 1911, were void as an attempt to regulate interstate commerce, then there could be no possible excuse, considering the provisions of Section 22 of the same article, giving the Railroad Commission the power to establish rates which should be conclusively just and reasonable, for contending that the rates which had been established by the Commission—as we endeavored to show and were prevented from showing—and which were in existence on October 10, 1911, were, on that date at least, the legal rates.

It then becomes necessary to consider—assuming the invalidity of Section 21 of Article XII—whether, by the amendment to the California Constitution effective October 10, 1911, rates theretofore legally existing, which violated the long and short haul clause in the amended Section 21, immediately and automatically became excessive and the subject of action to recover the difference. This necessitates reference to the provisions of the amended Article XII hereinbefore quoted.

The Court will observe that while in Section 21, Article XII, as amended October 10, 1911, it is provided that it shall be unlawful for a railroad to

charge a greater compensation for a shorter than for a longer distance over the same line or route, and while an application to the Railroad Commission and its permission after investigation is also provided as a relieving clause, Section 22 of the same Article, as amended at the same time, specifically provides that the Railroad Commission Act of California, approved February 10, 1911, shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently therewith.

The preceding portion of Section 22 as so amended states that no provision of the Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein, which are not inconsistent with the powers conferred upon the Commission; and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of the Constitution.

This "plenary clause" was construed by the California Supreme Court in *Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640, hereinafter considered.

It will thus be seen that the concluding portion of the amended Section 22 not only refers to but adopts as a part of itself the provisions of the California Act therein referred to, which must be con-

strued not only as a part of the amendment to Article XII but also as though it had been passed when the Legislature under the amended Section XII had power to confer on the Railroad Commission additional powers "of the same kind or different" from those conferred by the constitution as amended.

The Act so adopted by the amended Section 22 is popularly known as the Eshleman Act, effective February 10, 1911 (chap. 20, Cal. Stat. 1911, amended by chap. 386 Cal. Stat. 1911, in respects not relevant to this case).

Section 15 of the Eshleman Act gives the Commission power and makes it its duty to establish rates of charges for the transportation of freight and passengers by all railroads or other transportation companies subject to the provisions of the Act, which must be read with the plenary provision of the amended Section 22 "unlimited by any provision of this constitution."

Section 16 provides for the record at the office of the Commission of all rates so established, and provides that if the railroad company upon establishment of rates by the Commission shall not avail itself of the opportunity to be heard, the rates so established shall be conclusively just and reasonable. It dispenses with notice by the Commission to a carrier of the adoption of schedules filed by the carrier.

Section 17 provides for the filing and promulgation of tariffs, and Section 18 provides that "All rates of charges for the transportation of passengers and freight, and all classifications established by the

Commission shall remain in effect until changed by the Commission."

Section 22 provides that it shall be discrimination for a railroad to charge any greater, less or different rate than that established by the Commission.

It would seem, therefore, that, inasmuch as the provisions of the Eshleman Act above referred to were by the amended Article XII expressly made a part of that article, the charges established by the Commission and existing on October 10, 1911, were, by the constitutional amendment above referred to, expressly held in effect until changed by the Commission. It would follow logically that if the old Section 21 was void as under this point argued, or if, as we shall presently argue, the Commission nevertheless had the power to establish rates deviating from the provisions of that section, in either event the rates existing on October 10, 1911, were the rates lawfully to be collected by the carriers, not to be deviated from, under the penalties prescribed by the Act, and were the only rates which a railroad company lawfully had the right to collect. Obviously no action upon any theory of excessive charge could be maintained for the collection of such rates.

Thus the action of the trial Court in excluding the evidence of the witness Gomph, tending to show what rates were in effect on October 10, 1911, and what rates had theretofore been legally established by the Commission, was erroneous also as to the claims arising after October 10, 1911, because by the Court's rulings we were precluded from showing

that those claims were based upon rates actually established by the California Commission, which at the time of the collection had not in any manner been changed by the Commission, but which, on the contrary, had been reaffirmed by it by the chain of orders offered in and excluded from evidence, to which we shall shortly refer.

II.

To give the long and short haul clause of the old Section 21 the inflexible operation contended for by defendant in error, or to give the long and short haul clause of the amended Section 21 the immediate and automatic operation contended for by defendant in error, would in either event be violative of the provisions of the Federal Constitution, by depriving the plaintiff in error of property without due process of law, and by depriving it of the equal protection of the law.

In the first, second and third separate defenses of the plaintiff in error, beginning at page 337 of the printed record, it is alleged that the rates by rail between San Francisco and Los Angeles, on all of the commodities referred to in the complaint, are through rates, which have been forced down below a reasonable rate for the service by reason of actual water competition between the port of San Francisco and the ports of Los Angeles, and that to compel the plaintiff in error to carry property to intermediate points at less than a reasonable rate for the service rendered and at such through rates would be to require it to establish such intermediate rates

at less than a reasonable compensation for the service performed, would deprive it of its property without due process of law, would deprive it of the equal protection of the law, and would compel it to devote its property to public use at less than a reasonable return on the fair value of its property so devoted.

In the second separate defense (Record p. 339) it is also stated that the effect of Section 21, Article XII of the California Constitution before it was amended was to arbitrarily establish said forced and compelled through rates as intermediate rates against defendant, without due process of law.

The District Judge sustained the general demurrers to each of these defenses, but on the trial (Assignments of Error, Record p. 531) the plaintiff in error offered to show by the witness then on the stand—one J. K. Butler, its Assistant General Freight Agent—that in his opinion as a freight traffic man the rates charged to plaintiff's assignors in this case were reasonable in and of themselves for the service performed, and that the through rate contended for by plaintiff was a rate less than a reasonable rate in and of itself for the service to be performed under the through rate, and was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles.

By the two rulings complained of we were prevented from showing either that the rate sought to be enforced at the intermediate points was a less than reasonable rate, or that the through rate which

was attempted to be applied to it was a rate compelled by water competition to be maintained on a less-than-reasonable basis.

In the case of Louisville & Nashville R'y Co. vs. Kentucky, 183 U. S. 503, the Court said (page 510):

“To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the company is deprived of the power of charging reasonable rates for the use of its property, *and such deprivation takes place in the absence of an investigation by judicial machinery*, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other persons

are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. *Stone vs. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Chicago, Milwaukee & St. Paul Railway Co. vs. Minnesota*, 134 U. S. 418; *Reagan vs. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth vs. Ames*, 169 U. S. 466; *Lake Shore & Michigan Southern Railway Co. vs. Smith*, 173 U. S. 684.

“We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared in the present case that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for.”

The Supreme Court, however, has gone still farther since the date of the cases just cited, and has held in *Northern Pacific Ry. v. North Dakota*, 236 U. S. 585:

“But broad as is the power of regulation, the State does not enjoy the freedom of an owner.
* * * The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon a carrier and its property burdens that are not incident to its engagement. In

such a case it would be no answer to say that the carrier obtains from its entire intrastate business a return as to the sufficiency of which in the aggregate it is not entitled to complain.

* * * We have then to apply these familiar principles to a case where the State has attempted to fix a rate for the transportation of a commodity under which, taking the results of the business to which the rate is applied, the carrier is compelled to transport the commodity for less than cost, or without substantial compensation in addition to cost."

On page 598 the Court says that, while the Legislature has a wide range of discretion in the exercise of the power to prescribe reasonable charges,

"A different question arises when the State has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account."

And further, the Court says that the cases cited in the note on page 600 of the official report furnish no ground for saying that the State may set apart a commodity or a special class of traffic, and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate.

On the same day the Court handed down its opinion in *Norfolk & Western vs. West Virginia*,

236 U. S. 605, in which it approved the North Dakota case and further held

“that the devotion of the property of the carrier to public use is qualified by the condition of the carrier’s undertaking that its services are to be performed for reasonable reward; and that the State may not select a commodity, or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal.”

This is precisely what the effect of the old Section 21, Article XII, would be if it were given the inflexible operation contended for by defendant in error. It is furthermore exactly what the operation of the amended Section 21 would be if, as contended for by defendant in error, the long and short haul provision took effect immediately and automatically on October 10, 1911, without giving the carriers any chance to petition to the Commission for relief, and without giving the Commission any opportunity after a hearing to determine whether, and if so to what extent, relief should be granted, the latter determination, we take it, conforming to the accepted definition of due process of law.

In the first case—that of the old section—there was no process of law at all. The Constitution, according to defendant in error, used the through rate as a yard stick, no matter whether it might be reasonable or unreasonable at the intermediate

point, and no matter what might be the compelling traffic conditions, such as, in this case, water competition, which measured the utmost the carrier could charge for the through service.

The amended Section 21 endeavored to cure this manifest invalidity by vesting in the Commission the power to determine the extent to which the carrier might be relieved from the prohibitions of the long and short haul clause.

The learned District Judge, in his memorandum opinion on demurrer, says (Record, p. 364), in speaking of our claim that the inflexible enforcement of the long and short haul provision would operate to deprive us of property without due process of law:

“But that the enforcement of such a provision by the State is not repugnant to any right guaranteed by the Constitution of the United States, has been definitely announced in *Louisville & Nashville Railway Co. vs. Kentucky*, 183 U. S. 503, involving a substantially similar provision of the Kentucky Constitution, and the doctrine has been reaffirmed by that Court in the *Intermountain Cases*, U. S. vs. A. T. & S. F. Ry. Co., 234 U. S. 476.”

We respectfully submit, however, that the learned District Judge was in error in two respects: *first*, that the United States Supreme Court has never upheld the inflexible enforcement of a long and short haul clause—that is, an enforcement without any discretionary or relieving power being somewhere

vested; and, *second*, that the provision of the Kentucky Constitution passed upon in 183 U. S. 503 is not substantially similar to the provisions of the old Section 21 of Article XII of the California Constitution.

An examination of the Louisville & Nashville case we think will demonstrate this. In that case a writ of error issued to the Kentucky Court of Appeals, which had affirmed a judgment by which the railway company was sentenced to pay a fine of \$300 for violating a statute of that State which made it unlawful for a railroad

“to charge or receive any greater compensation in the aggregate for the transportation of passengers or of property of like kind under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance.”

In respect to the words “substantially similar circumstances and conditions”, and also in respect to the general prohibition, the Kentucky statute was practically identical with the provisions of Section 4 of the Act to Regulate Commerce as originally passed in 1887, and as it stood until the amendment of June 18, 1910. At page 481 of 234 U. S., in the Intermountain Cases, the opinion reproduces a graphic comparison of the old and new Fourth Sections of the Interstate Commerce Act, enabling the section at a glance to be read as it was before and as it now stands after amendment.

The Kentucky statute, which was Section 820 and which was based upon Section 218 of the Constitution, is, with the constitutional section and the other Kentucky statutes, set forth in full in *McChord vs. Louisville & Nashville Railway Co.*, 183 U. S. 483.

Section 218 of the long and short haul statute contained a proviso (183 U. S. 489),

“that upon application to the Railroad Commission such common carrier * * * may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property.”

Section 817 of the Kentucky statute defined discrimination.

Section 818 forbade preference or advantage.

Section 819 provided that in case of extortion or discrimination the carrier offending should be fined not less than \$500, etc., and should also “be liable in damages to the party aggrieved, to the amount of damages sustained.”

Section 820 provided a penalty for a violation of the long and short haul clause, still using the words “under substantially similar circumstances and conditions”, but provided that if the Commission was complained to it should investigate the grounds of complaint and might exonerate the railroad from the operation of the provisions of the section, but

that if it failed to exonerate the railroad the railroad company might be indicted for the offense.

In the Louisville & Nashville case, relied upon by the learned District Judge in the case at bar, it appeared that the indictment was found (p. 506) "not in advance of any action by the Railroad Commission, but on its recommendation," and the railroad company endeavored to defend by showing that the circumstances and conditions under which the charges were made were not substantially similar to those ordinarily obtaining. The Court said (p. 511):

"In the present case we have only to do with the question of the validity of the action of the Railroad Commission's proceeding under Section 820 of the statutes, which prescribe uniformity of rates for all distances, long or short, and make penal disregard of such uniformity by railroad companies, except when authorized by the Commission to charge less for longer than for shorter distances. * * *

"The question for us, in the present case, is whether the State, by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, deprives the plaintiff in error of its property without due process of law, and denies to it the equal protection of the laws."

Throughout the opinion it is shown that the Court had in view (p. 508), *first*, the fact that the Supreme Court of Kentucky had held that the expression "substantially similar circumstances and conditions" did not imply that the carrier might be the judge, but that the law, taken as a whole, invested the Commission with the power to determine whether, and if so to what extent, the carrier might be relieved; and, *second*, that the carrier had had its day in court before the Commission, under the construction adopted by the Supreme Court of Kentucky, which was held to be binding upon the United States Supreme Court.

So that, in the Louisville & Nashville case we have, as to the rates there in question, a carrier which had submitted itself to a tribunal which was constitutionally vested with the power to determine the extent to which it might be relieved, and therefore the Court held, as it would doubtless hold under the provisions of the amended Section 21 of the California Constitution, that the carrier had not had these rates fixed without due process of law, but had had its day in court.

The Intermountain Rate Cases relied upon by counsel and cited by the Court in its memorandum opinion on demurrer in the case at bar are in 234 U. S., beginning at page 476. In these cases the Court points out the difference between the Fourth Section of the Interstate Commerce Act and the amended Fourth Section, stating that under the original Fourth Section the power was in the carrier

to meet competitive conditions by charging a lesser rate for the shorter than for the longer haul, but that that power, by the amendment, has ceased to exist because to do so in the absence of some authority would not only be inimical to the provisions of the Fourth Section but would be in conflict with the preference and discrimination clauses of the Second and Third Sections:

“But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, *and if not is in any event by necessary implication granted*. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the Second and Third Sections.”

We take it, therefore, that in the Intermountain Cases the Supreme Court recognized the principle we contend for here, that any legislation which, without affording the carrier an opportunity of a day in court, establishes rates which are confiscatory

or less than reasonable, or which ignore the compelling force of competition at the further point, operates to deprive the carrier of its property without due process of law, and to deprive it of the equal protection of the law; and furthermore that when this power of determination, instead of being vested in the carrier, is, under the provision, "under substantially similar circumstances and conditions", vested in a commission or other tribunal, the determination of the question must be had with due regard to the rights and property of the carrier. In other words, the tribunal being designated, it must act as a tribunal and not arbitrarily or capriciously.

If, with these principles in mind, one again takes up the Sections 21 and 22 of Article XII of the old Constitution, the difficulties thus apparent are easy of solution when the two sections are considered together as they should be. Considering the two sections together, it is manifest that it was their intention that the Railroad Commission described in Section 22, whose power and duty it was to fix rates which should be deemed conclusively just and reasonable, should endeavor, in prevention of discrimination, to fix such rates in conformity with the long and short haul provision of Section 21, but that if it did not see fit literally to obey that provision in all cases, its deviation therefrom was to be taken as an exercise of the relieving power, such as that found in the Kentucky Constitution, the amended section of the California Constitution, and Section 4 of the Interstate Commerce Act both as originally

passed and as amended. Only in this way can be prevented the confiscatory operation of Section 21, standing alone, which effect we have pleaded and offered to prove here. Only in this way can the two sections be harmonized, and the system of published and uniform rates contemplated both by the old and the new sections of the Constitution be carried out.

There is no greater difficulty, when we come to consider the provisions of the amended Sections 21 and 22. The framers of these sections knew that thousands of rates existed in the State of California which did not measure up to the standard of the long and short haul rule. It is inconceivable that they would have so framed the section as immediately upon its adoption to throw the entire rate system of California into chaos, and to make it impossible for either shipper or carrier to know what the legal rate was. It must be presumed, also, that the framers of the section were familiar with the provisions of the Eshleman Act, which were adopted by the section and which provide, as we have shown, that rates established by the Commission shall remain in effect until changed by the Commission.

We think it only a fair construction to say that it is the intention of the amended sections to permit the collection of the rates effective on October 10, 1911, until such rates are changed by the Commission either on petition of the carrier or on complaint filed by a citizen, or by voluntary action by the Commission, all three of which methods are avail-

able under both the Eshleman Act and the present California Public Utilities Act.

III.

The defendant in error had no right of action for the recovery of the difference between the greater charge for the shorter distance and the lesser charge for the greater distance, because

1 No such right of action existed at common law;

2 No such right of action has been conferred by any provision of the California Constitution;

3 No such right of action has been conferred by any California statute.

In this, an action at law, unless the case be founded upon at least one of the above mentioned classes, defendant in error is remediless.

1 Has defendant in error a right of action upon any common law theory? We submit that it has not, both because in the case at bar it is neither alleged nor shown that the rate charged was unreasonable in and of itself, and, because it is neither pleaded nor shown that assignors of defendant in error, or any of them, or defendant in error itself, have been damaged by the collection of the so-called excessive charge.

Under the California system of jurisprudence all common law rights of action are preserved, except where such common law right of action is forbidden by statutory or constitutional provisions. (Sharon

vs. Sharon, 75 Cal. 13.) Common law rules though not forbidden by statute if unadapted to California conditions (*Katz vs. Walkinshaw*, 141 Cal. on p. 122, et seq) or inconsistent with our Constitution (*Hahn vs. Garrett*, 69 Cal. 147) do not obtain.

The essential elements of a common law action against a common carrier, based upon the exaction of an unreasonable charge, are fully considered and stated in the case of *Cowden vs. Pacific Coast Steamship Company*, 94 Cal. 470, annotated in 28 Am. St. Rep. 142 and 18 L. R. A. 221. The syllabi distinctly state the reasoning of the Court as follows:

“A complaint in an action by a shipper against a carrier, which substantially alleges that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from the same point than another merchant, but which does not allege that the charge to the plaintiff was unreasonable and excessive, does not state a cause of action at common law, and an allegation of discrimination or inequality is not the equivalent of an allegation of an excessive charge.

“Under the common law, a carrier is under no obligation to treat all customers equally, but he may carry for favored individuals at an unreasonably low rate, or even gratis, the law requiring only that he shall not charge any more than is reasonable. The fact that the carrier

charges others less is only evidence tending to show that the charge is unreasonable.”

We assume that in the case at bar the Cowden case should be considered as controlling on the question of whether in California, at least, an action may be maintained against a common carrier in which while it is alleged that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from a given point than another merchant to the same or another point, it is not alleged that the charge to the plaintiff was unreasonable and excessive; and that the case is also California authority to the point that an allegation of discrimination or inequality is not the equivalent of an allegation of excessive charge.

If authority, however, be needed in support of the doctrine so announced by the California Supreme Court, it may be found in the following American cases which are entirely consonant with the decision in the Cowden case:

Penn. R. Co. vs. Coal Co., 230 U. S. 184-200;

Johnson vs. Pensacola, etc., R. Co., 16 Fla. 623; 26 Am. R. 731;

Ex Parte Benson, 18 S. C. 38; 44 Am. R. 564;

Cook & Wheeler vs. Chicago, etc., R. Co., 81 Ia. 733-6;

C. & A. R. Co. vs. People, 67 Ill. 11-18; 16 Am. R. 599;

Sloan vs. Pacific R. R., 61 Mo. 24-32; 21 Am. R. 397;

Peters vs. Scioto & N. H. R. Co., 42 Ohio 56,
275; 57 Am. R. 814;

Ill. & St. R. Co. vs. Beaird, 24 Ill. App. 322.

It thus appears that at common law the defendant in error cannot base its action on the theory that it is suing for the collection of a charge unreasonable in and of itself for the service performed. We do not anticipate that any such claim will be made in the brief of the defendant in error, or on oral argument. We will next consider whether any form of action on the case lies in favor of the defendant in error on the facts alleged and proven. In this connection it will be observed that the complaint contains no allegation of general or special damage and that no proof of any general or special damage was offered or admitted. In fact, as most of the assignors to the defendant in error seem to be mercantile firms which have probably passed on their so-called excessive charge to their customers, the reason why special damage is not alleged is quite apparent. It is, we feel, unnecessary to cite authorities to support the statement that at common law case will not lie without both an allegation and proof of special damage, or a statement of fact from which the Court will imply general damage. The Court will not do so here (230 U. S., pp. 204-205) nor at common law did trespass on the case lie merely for the carrier charging one person more than another for the same service. (230 U. S., para. 4, p. 200.)

Nor will an action lie to recover money had and received since the carrier is prohibited by Section

22 of Article 12 of the California Constitution, as it existed both before and after the amendment of October 10, 1911, and by the provisions of both the Wright and Eshleman Acts and the present Public Utilities Act, on pain of severe penalties, from paying rebates or drawbacks from its published rates.

Therefore an action upon a common count as and for money had and received will not lie since it was not only not the duty of the carrier to restore the money but on the contrary was its duty not to restore it. Nor can the theory of money had and received be tenable as for money which in (equity and good conscience) ought to be restored because equity and good conscience alike forbid violation of substantive legal prohibitions. In this connection we will presently refer to the defense of "voluntary payment".

2 Has defendant in error any right of action created by the Constitution of the State of California? We think we have shown by the citation of Section 12 of the California Constitution as now in effect and as it existed in the Constitution of 1879 that the framers of the Constitution did not in terms give to any person aggrieved by the violation of the so-called long and short haul clause either as it stood originally or as it was carried into the amendment, any constitutional right of action therefor as distinguished from a right of action existent at common law or created by statute. In fact the Legislature has expressly negated such an idea by predicating

the legislatively created right of action on a showing of damages, and also by the Eshleman Act, which became effective February 10, 1911, providing in Section 32 a penalty recoverable by the State and not by an individual for the failure or refusal of a railroad company to perform any duty enjoined upon it by the Constitution for which a penalty has not been provided by law.

We also beg to remind the Court at this point that we have shown that this provision for a penalty recoverable by the State together with all other provisions of the Eshleman Act was carried into and expressly made a part of the amended Article 12 of the California Constitution, which took effect October 10, 1911. Therefore we say that Section 21 of the Constitution as so amended is to be read and considered as though it said "it shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or road, in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as to other rate than the aggregate of the intermediate rates. Provided, however (Sec. 32, Eshleman Act), that if it does charge or receive such greater compensation, for every such violation of the provisions of the preceding clause it shall pay to the State of California a penalty of not less than \$500 nor more than \$2000".

This brings us then to the point that where a constitutional provision prescribes a remedy or penalty for its violation, that remedy or penalty is exclusive. If it does not prescribe a remedy or penalty and no remedy or penalty exists under the common law or under a statute, an individual injured by a violation of the statute has no right of action. The principle is illustrated by numerous cases. In the case of *Ward vs. Severance*, 7 Cal. 126, a case not since reversed or modified, the Court says:

“Where a new right is created by statute, the party complaining of its violation is confined to his statutory remedy so far as the Courts of Common Law are concerned. If, however, the right existed at common law, the remedy provided by statute is merely cumulative.”

We think we have shown that at common law a person who has been charged more for the short haul than someone else had been charged for the long haul had no right of action either in assumpsit or on the case merely because he had been charged the greater amount; that unless he could show that the rate charged was unreasonable in and of itself for the service performed and that such unreasonable rate had been exacted from him, he was without remedy at common law. It is also familiar learning that the long and short haul principle is one of American creation and did not exist at common law. Therefore when the framers of the California Constitution attempted to make the long and short haul provision a part of the constitutional scheme for

regulation of rates, they at most created a new right, and when under the provisions of Section 24 of Article 12 of the Constitution of 1879, that "The Legislature shall pass all laws necessary for the enforcement of the provisions of this article" the Legislature did pass the series of acts hereinbefore referred to, and in those acts not only did not give a shipper the right to recover damages for violation of the long and short haul admonition, but on the contrary provided in Section 32 of the Eshleman Act, carried forward as we have shown into the amended Section 12 of the Constitution, that for the failure to obey a provision of the Constitution a railroad should be fined at the suit of the State, it seems clear that by both silence and direct exclusion the right of action claimed by the defendant in error is unsustainable. In point are a few of the many cases on the question of the creation of a new right and exclusiveness of the remedy.

The Supreme Court of New York in the case of Savings Association vs. O'Brien, 51 Hun. 45, said, quoting from the case of Pollard vs. Bailey, 20 Wallace U. S. 526:

"The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. At common law it does not exist. * * * In this case the liability and the remedy were created by the same statute; this being so, the remedy provided is exclusive of all others. A general liability created by statute without a remedy may be enforced by a common law action, but where

the provision for the liability is coupled with a provision for a special remedy that remedy and that alone must be employed."

In the case of *Dudley vs. Mayhew*, 3 N. Y. 9, the Court of Appeals of New York said, speaking of the common law remedy for infringement of a patent:

"The question wholly depends upon the point, whether it be a right newly granted or not. If it was, then it would receive its birth, duration and remedy from the statute and no other remedy could be pursued."

The Supreme Court of Michigan, in the case of *Thurston vs. Prentiss*, 1 Michigan 193, in discussing a statute prohibiting usurious interest contracts, said:

"The statute gives the only remedy and the parties are confined to it. The contract was made in reference to it and even if the remedy by statute was repealed, yet the parties would not be entitled to a remedy in a Court of Equity or by an action for money had and received."

The New York Court of Appeals in the noted case of *Jessup vs. Carnegie*, reported in the 80 N. Y. 441, says:

"The rule is no doubt well understood that where the remedy is a statutory one and a new right given and specific relief prescribed for a violation of such right, the remedy is confined to that which the statute gives."

In the case of *Young vs. Kansas City, etc., Ry. Co.*, 33 Mo. App. Rep. 509, the Court, in speaking of a Missouri statute regulating railroad charges, said that the statute repealed the common law and provided minutely for all questions which might arise concerning compensation for the transportation of freight. Judge Ellison said:

“The legislature has revised the whole subject of the carriage of freight and has evidently intended that the provisions of the statute shall be a substitute for the common law on this subject, this being, as we have said, one of the frequent ways in which a repeal may be had.”

This case is well worth examination in the present inquiry.

A classic on this subject is that of *Almy vs. Harris*, 3 N. Y. Common Law Reports, 985; 5 Johnson 175. This was an action on the case for the disturbance of the enjoyment of a ferry across the Cayuga Lake. The Court took jurisdiction of the case by certiorari directed to the Justice's Court wherein the action was brought. The Court said:

“There is one error which we consider fatal, and for that we think there must be a judgment of reversal. The Act to Regulate Ferries within this State (20 Sess. Ch. 64, Sec. 1) prohibits any person, except within the southern district, the Counties of Orange and Clinton, from keeping or using a ferry, for transporting across any river, stream, or lake, any person or persons, or any goods or merchandise, for profit or hire,

unless licensed in the manner directed by that act under a penalty of five dollars

“If Harris had possessed a right at the common law, to the exclusive enjoyment of this ferry, then the statute giving a remedy in the affirmative, without a negative expressed or implied, for a matter authorized by the common law, he might, notwithstanding the statute, have his remedy by action at the common law. (1 Com. Dig. Action on Statute, C.) But Harris had no exclusive right at the common law, nor any right but what he derived from the statute. Consequently, he can have no right, since the statute, but those it gives; and his remedy, therefore, must be under the statute, and the penalty only can be recovered.”

In the case of Mack vs. Wright, 180 Pa. St. 472, there was considered a Pennsylvania statute making it the duty of persons constructing buildings to cover the floor joists during construction so that workmen would not fall from one floor to another. The plaintiff's husband would not have been killed had the statute been observed, though it was conceded that no common law negligence of the employer was shown. The plaintiff sued *on the statute* which did not in terms confer a right of action other than a penalty recoverable by the State. The Court said:

“When the Legislature has imposed a new duty and intended that there should be cumulative remedies for the breach of it, it has usually,

if not uniformly, said so in plain terms. The inference is that if the Legislature had intended that, in addition to the penalty imposed by the statute, a party injured by such non-performance should have an action for the damages sustained thereby, it would have said so."

In the case of *Grant vs. Slater Mill & Power Company*, 14 R. I. 380, the Court, in speaking of a building ordinance which required fire-escapes and in discussing a case in which the plaintiff was injured by reason of the absence of a fire-escape, said:

"It was no part of the scheme of this act to create any duty which was to become the subject of an action or suit of individuals and, therefore, no remedy for individuals beyond that which is expressly given should be implied for any mere negligence of the duties imposed by the act."

In *Burbank vs. Bethel Steam Mill Co.*, 75 Maine 373, the Court said in discussing an action to recover damages for the burning of property caused by the use of a stationary steam engine which was erected and used without a license:

"The act was merely a police regulation declaring that a stationary steam engine erected without a license should be deemed a common nuisance; it gave no action to any person injured by it; his right of action, if any, was at common law."

In *Janney vs. Buell*, 55 Ala. 408, the Court said:

“At common law there was an appropriate remedy for the enforcement of every right; and if there was no adequate legal remedy the Court of Chancery supplied the defect. But this principle applies only to common law rights and does not extend to rights created by statute for the enforcement of which the statute itself provides a specific though inadequate remedy.”

This case has been followed in a number of Alabama cases ending with *Sheffield City Company vs. National Bank*, 131 Ala. 188; 32 Southern 598. The same Court held in *Chandler vs. Hanna*, 73 Ala. 390:

“When a right is solely and exclusively of legislative creation, when it does not derive existence from the common law or from the principles prevailing in Courts of Equity, and jurisdiction of itself is limited to particular tribunals and specific, peculiar remedies are provided for its enforcement, the jurisdiction and remedy being bounded by the statute can be exercised and pursued only before the tribunals and in the mode the statute provides.”

In the case of *Ryan vs. Ray*, 105 Ind. 101, it was said by the Supreme Court in speaking of a statute regulating banks:

“The Legislature having provided a complete remedy through an officer of the State who has been given a general supervision over the affairs of savings banks, no reason is apparent why

the rule should not apply that the remedy thus provided is exclusive of all others.”

To the same effect is the case of *Cole vs. City of Muscatine*, 14 Iowa 296, and the cases cited therein.

A familiar illustration of the extent to which the Courts have applied the doctrine of the exclusiveness of the prescribed remedy is found in a line of cases arising in the Eastern States where municipal ordinances have been passed requiring the removal of snow and ice from side-walks, and where actions for personal injuries have been brought without any pleading of negligence on the part of the lot owner, but merely in reliance upon the fact that the lot owner had violated the ordinance and that, therefore, a right of action inured to the benefit of anyone injured by reason of this violation. It has been, we believe, uniformly held that where a penalty is prescribed by an ordinance, the ordinance may, in some cases, be admissible on the issue of negligence, but that an action by the injured party must be on the ground of the lot owner's negligence and not on the ground of the lot owner's disobedience of the ordinance. Examples of these cases are:

Fielders vs. North Jersey St. Ry. Co., 68 N. J. L. 343; 96 Am. St. Rep. 552;

City of Hartford vs. Talcott, 48 Conn. 525; 40 Am. Rep. 189;

Taylor vs. Lake Shore, etc., Railroad Co., 45 Mich. 74; 40 Am. Rep. 457;

Heeney vs. Sprague, 11 R. I. 456; 23 Am. Rep. 502.

3 Having, as we believe, shown that the defendant in error neither pleaded nor proved any common law or constitutional right of action, we will now inquire whether by virtue of any California statute defendant in error has any right of action on the pleadings and proofs.

The first matter to be observed is that in each of the 120 causes of action pleaded in the complaint, plaintiff below merely said that on a certain day its assignor had been charged more for a certain shipment to a certain station of delivery from a certain point of origin, than the defendant below was then charging from the point of shipment to a more distant point in the same direction, and that the difference between the amount paid and the amount which would have been paid if the through rate had been charged was "an excessive charge". Nowhere is it alleged in any of the 120 counts or in the prayer for relief, that either the plaintiff below or any or all of its assignors had suffered financial loss or pecuniary damage in any amount whatever by the collection of this so-called excessive charge. For all that appears the assignors may have passed the charge along to customers as does a shipper who buys a commodity from a wholesaler in bulk and sells it to retailers, add to his wholesale price the cost of freightage and other overhead expenses of conducting the business as well as a profit on the transaction.

The Interstate Commerce Commission has held in many cases that the doctrine of reparation does

not obtain in such a case where the charge has been passed on to others by the person paying it to the carrier, and where such person has not shown any damage to himself. It is our contention that in any statutory right of action upon which the defendant in error may rely it is incumbent upon it both to plead and prove damage, and that nowhere in the California statutes is a right of action given a shipper against a carrier, except on the theory of a damage suffered by the shipper. Use of the word damage in the California Statutes to which we shall presently refer, is exactly the same as that word is used in Section 8 of the Act to Regulate Commerce, which provides that in case any common carrier, subject to the Act, shall do any act, matter or thing prohibited by the Act or declared by it to be unlawful, the carrier shall be liable "to the person or persons injured thereby for the full amount of damages sustained".

Of an action under that Section the Circuit Court of Appeals of the 8th Circuit said in *Knudsen & Co., vs. Michigan Cen. Ry.*, 148 Fed. 969, page 974:

"To support a recovery under this section, there must be a showing of some specific pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the commission. It is not every imperfect or inaccurate specification of rates

in the schedules that will give to a shipper a cause of action for damages. He must show, either that there *has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him.* The plaintiff here, having founded his cause of action upon a technical construction of the law, and without the basis of any ruling or order of the commission, seeks to recover without proof of pecuniary damage.” * * *

“There is no presumption that rates specified in official schedules are unjust and unreasonable. The record before us discloses no finding and ruling of the commission against the reasonableness of the rates, and there was no proof upon the subject. There was no proof that what the plaintiff actually paid was in excess of a reasonable compensation for the services performed, whether considered separately or in the aggregate; nor does it appear that any discrimination of any kind or character was practiced against it. In the absence of a showing of injury or damage, there can be no recovery.”

The doctrine of the Knudsen case is also approved by Mr. Justice Lamar on page 207 of the opinion in *Penna. R. Co. vs. International Coal Co.*, 230 U. S. 184, in addition to which he says:

“On the civil side the Act provided for compensation—not punishment. Though the Act has been held to be in many respects highly penal, yet there was no fixed measure of damage

in favor of the plaintiff. But, as said in *Parsons vs. Chicago & N. W. Railway*, 167 U. S. 447, 460, construing this section (8) 'before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury'. Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what though called damages would really be a penalty, in addition to the penalty payable to the Government." * * *

"The statute gives a right of action for damages to the injured party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved. And although the plaintiff insists that in all cases like this the fact and amount of the pecuniary loss is matter of law, yet this contention is not sustained by the language of the act, nor is it well founded in actual experience, as will appear by considering several usual and every-day instances suggested by testimony in this record."

Our citations of the California statutes known as the Eshleman Act and the present California Public Utilities Act, both show that the existence of damages is necessary before any right of action

upon any theory for the recovery of money can be maintained by a shipper. Section 28 of the Eshleman Act providing for reparation orders, by the Commission, provides that a carrier may be called upon "to pay and satisfy the damage done to the complainant", and provides, "that all damages awarded by the Commission" may be collected by action therefor. The same section further provides that its provisions shall not be deemed to abridge or affect the right of any person to institute in any court any character of action against any railroad "for any wrong or damage". Section 43 provides that if a railroad company violates any provision of that Act, it shall be liable to the person "injured thereby for the damages sustained," and if the company is guilty of discrimination, it shall then "in addition to such damages" be liable in punitive damages.

This action was brought January 14, 1913 (Record, p. 333).

The California Public Utilities Act, effective March 23, 1912 (Chapter 14, Statute Special Session 1911), had superseded the Eshleman Act. The penal provisions material here are Sections 73 (a), 74 (a), 76 (a), and 80, which read as follows:

Section 73 (a):

"In case any public utility shall do, cause to be done, or permit to be done, any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the consti-

tution, any law of this State, or any order or decision of the commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the Court shall find that the act or omission was willful, the Court may, in addition to the actual damages, award damages for the sake of example and by way of punishment. An action to recover for such loss, damage or injury, may be brought in any Court of competent jurisdiction by any corporation or person.”

Section 74 (a) :

“This act shall not have the effect to release or waive any right of action by the State, the commission, or any person or corporation for any right, penalty or forfeiture which may have arisen or accrued, or may hereafter arise or accrue, under any law of this State.”

Section 76 (a) :

“Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this act, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than \$500 nor more than \$2000 for each and every offense.”

Section 80:

“Actions to recover penalties under this act shall be brought in the name of the people of the State of California * * *.”

The Court will observe that in Section 73 (a) violation of the Constitution makes a public utility liable to the persons or corporations affected thereby “for all loss, damages or injury caused thereby”. Section 76 continues, in effect, a provision of Section 32 of the Eshleman Act, by providing a penalty of not less than \$500 nor more than \$2000 for violation by a public utility of a provision of the California Constitution. Section 80, provides that an action to recover such penalty, shall be brought in the name of the State. Therefore we repeat that there is nowhere in the statutes of the State of California, either as they existed at the time the shipments in question moved or as they existed at the time this action was brought, January 14, 1913, any provision of any statute of the State of California conferring upon the assignors of the defendant in error any right of action under any theory whatever for the collection of the rate alleged herein to be excessive, unless such assignors could and did plead and prove that they had been damaged or pecuniarily injured by the collection of the rate in question.

And we go further and say not only is there an absence of any statutory theory for the collection of the so-called excessive charge merely on the allegation without an allegation of damage that it had been collected, but also that the Legislature by

expressly providing, as we have shown that damage is the essential element of every action to recover for the violation either of the provisions of the Constitution or of the Railroad Commission acts, has effectively foreclosed any claim that may be made by the defendant in error that it is relying upon the common law liability or a common law right of action. This statement we make on the familiar principle that a statutory right of action comprehensively covering a given field is a substitute for common law rights of action theretofore existing.

In addition to this consideration we also again call the Court's attention to the fact that the Legislature so far from conferring any right of action upon the aggrieved shipper for the collection of the so-called excessive charge herein sued for, has seen fit, both by the provisions of Section 32 of the Eshleman Act and the provisions of Section 73 (a) of the present California Public Utilities Act, to provide that for the violation of a constitutional provision the suit is that of the State and not of the individual, which as we believe we have shown makes the State's remedy exclusive.

Section 21 of Article XII of the California Constitution of 1879 does not in terms confer any right of action upon any person aggrieved by a violation thereof. That is to say, it is, if not void, merely a constitutional admonition against a railroad's charging more for the shorter than for the longer haul under certain conditions. It was en-

forceable only by mandamus or suitable proceeding against the Commission on behalf of the community affected, and even if it were enforceable on behalf of a shipper aggrieved by its violation such shipper, as we have argued, must show pecuniary damage personal to him, which is neither pleaded, shown nor claimed here.

Section 21 of Article XII, after forbidding discrimination between places and persons, provides merely for the delivery of property at a station, at charges not exceeding the charges for the transportation of property of the same class in the same direction to a more distant station. It contains no penal provision, nor does it give the person aggrieved a right of action, and, as we have previously endeavored to show, unless such aggrieved person had a right of action by statute or at common law, he has no right of action at all. The essence of the so-called long and short haul legislation is that it is for the protection of communities, not for the protection of individual members of communities, unless by appropriate proceedings they can show that they have been personally damaged by the violation.

The long and short haul clause under consideration, as framed, is, we take it, merely an admonition to the Commission to observe that rule in establishing the conclusively just and reasonable rates provided for in the succeeding Section 22, which, when construed *in pari materia* with the provisions of Section 21, amount to a relieving clause against the rigid and inflexible enforcement of the rule in Section 21 contended for by defendant in error.

The question of enforceability of the old Section 21 came up before the California Commission in a contested matter—the case of Scott Magner & Miller vs. Western Pacific Railway Company, decided on April 12, 1913, reported in Volume II of the Opinions and Orders of the Railroad Commission of California, at page 626. In considering the provisions of the Constitution of 1879, and considering the provisions of Sections 21 and 22 *in pari materia*, the Commission said, in response to a suggestion that notwithstanding that rates in violation of the long and short haul provision had been established by the Commission prior to October 10, 1911, a shipper who had paid the greater rate for the lesser distance was entitled to reparation at the hands of the Commission, on the theory that the Commission had failed in its duty by establishing rates under Section 22 in contravention of the principle of Section 21.

“The system of State-made rates established by the Constitution of 1879 could not have contemplated a right to reparation except in case the carrier charged a rate in excess of that established by the Commission. In a scheme providing that the State itself establishes rates which shall be conclusively just and reasonable, there is no room for the doctrine of reparation, except as indicated. The fact that the Commission may have failed in its duty cannot change the law or create a new system.”

And further the Commission, on page 636, said, with respect to a claim that reparation might be had

at the hands of the Commission, on the ground that a Commission-made rate prior to October 10, 1911, was unjust and unreasonable:

“The framers of the Constitution of 1879, however, provided in Section 22 of Article XII that the rates should be established and published by the Railroad Commission and not by the carriers, and that the rates so established and published should be deemed in all proceedings, both civil and criminal, to be conclusively just and reasonable. It could hardly be held that a shipper could recover from a carrier for charging a conclusively just and reasonable rate—a rate, moreover, which the carrier was compelled, under heavy penalties, to charge. If the shipper were dissatisfied, he could apply to the Railroad Commission to alter the rate, but it would certainly be entirely at variance with such a system of State-made rates to hold that the Commission, in addition to making an order as to the just and reasonable rates to be thereafter charged, should also compel the carrier to pay remuneration for having charged the rate which the Railroad Commission compelled it to charge, and which, under the Constitution, became a conclusively just and reasonable rate. We are accordingly of the opinion that if the Railroad Commission had established defendant's rates, as it was its duty under the Constitution to do, no right to reparation could have arisen, on the theory of unjust or unreasonable rates on the facts as stated in this complaint

prior to October 10, 1911. The shipper's remedy would be to petition the Commission to alter the rate and then to sue the carrier if he failed to conform to the rate so established. The United States Supreme Court, in the cases of *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, and *Robinson vs. Baltimore & Ohio R. Co.*, 226 U. S. 506, has expressed its views with reference to the relation between the Interstate Commerce Commission and the courts in entire harmony with the views herein expressed as to the effect which the establishment of a system of State-made rates had on the common-law right to sue for damages by reason of the collection of an unjust or unreasonable rate."

That the Legislature of California has never considered that the provisions of Section 21 of the California Constitution of 1879 conferred a right of action upon an individual, irrespective of whether he pleaded and proved that he had been pecuniarily damaged, is shown by legislative history. The first Act was the so-called Wright Act, approved March 19, 1909 (Cal. Stat. 1909, p. 499; Deering's General Laws 1909, p. 1062). This provided a comprehensive system for the establishment of rates by the Commission.

Section 21 gave the Commission power to determine that a party complainant was entitled to an award of *damages* under the provisions of the Act, for a *violation thereof*, and provided for the enforcement of that order by a civil suit.

Section 31-d provided:

“No common carrier, subject to the provisions of this Act, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carriers to charge and receive as great a compensation for a shorter as for a longer distance haul.”

Section 38, still carrying out the theory that an aggrieved shipper must prove and show damages, provided:

“In case any transportation company subject to this Act, or any person or corporation within the provisions hereof, shall do, cause to be done, or permit to be done, except unintentionally or innocently through a mistake of fact, any matter, act or thing in this Act prohibited or declared to be unlawful, or shall similarly omit to do any act, matter or thing herein required by this Act to be done, such transportation company, person or corporation shall be liable to the penalties hereinbefore provided for, and shall, in addition, be liable to the person or persons, firm or corporation injured by such act or omission, for the damages proximately

resulting therefrom; and in addition to such damages, such transportation company, in all cases where the same shall be guilty of extortion or unjust discrimination as defined in this Act, shall pay to such person, firm or corporation so injured a penalty of not less than \$500 and not more than \$5000."

And Section 40 would seem conclusively to cut off any private right of action based upon a violation of the constitutional provision in question, except by proceedings before the Commission and the courts, provided for in the Wright Act, in which proceedings, as we have shown, damages must have been proven:

"In all actions between private parties and transportation companies subject to the provisions of this Act, in respect to any rate, charge, order, rule or regulation published as required by this Act, the published rate, charge, order, rule or regulation shall be deemed to be just and reasonable, and shall not be open to controversy except in and by way of such proceedings for that purpose before the Commission and the courts as are provided for in this Act."

This so-called Wright Act was in effect at the time the tariffs referred to and which were attempted to be introduced in the testimony of the witness Gomph were established and approved by the Commission.

On February 10, 1911, the Eshleman Act (Cal. Stat. 1911), to which we have already referred, went

into effect. It still carried out the legislative theory of deprivation of a right of action by an aggrieved shipper who has been charged more for a shorter than for a longer distance, and goes farther by prescribing what shall be the penalty exacted of a railroad company violating either the provisions of the Act or the provisions of the statute. We have already referred to the sections of the Eshleman Act relative to the establishment by the Commission of rates, and the filing of tariffs, and the remaining in effect of those rates until they were changed by the Commission.

The penal sections of the Eshleman Act applicable here are Sections 22, 28, 41 and 43, so far as private rights of action are concerned, and in none of these is a shipper who has been charged a Commission-made rate for the shorter distance, which is in excess of the Commission-made rate for the greater distance, given any right of action. If under the sections just referred to he predicates his right of action upon having been damaged, it is clear that all of these sections require pleading and proof of such damage, which is entirely absent in the case at bar.

We have purposely passed over Section 32 of the Eshleman Act, which reads as follows:

“If any railroad or other transportation company doing business in this State shall fail or refuse to perform any duty enjoined upon it by this Act or by the Constitution of this State, for which a penalty has not been provided by

law, or shall fail, neglect or refuse to obey any requirement, order, judgment or decree made by the Commission, for every such failure, neglect or refusal it shall pay to the State of California a penalty of not less than \$500 nor more than \$2000. The Commission, in addition to any and all powers conferred upon it by this or any other Act or by the Constitution of this State, shall have the power to enforce any order or to enforce the performance of any duty enjoined upon any railroad or other transportation company, or officer or agent thereof, by proceedings for mandamus or injunction in any court of competent jurisdiction against any such railroad or other transportation company or officer or agent thereof. This method of enforcing orders or the performance of duties is cumulative of and in addition to any other method provided in this or any other Act or in the Constitution of this State,"

for the purpose of accenting the point that here, for the first time, the Legislature of the State of California prescribed a penalty for the violation by a railroad company of a duty enjoined upon it by the State Constitution. The only penalty, your Honors will observe, in Sections 21 and 22 of the Constitution of 1879 is that prescribed in Section 22 for failure to conform to the Commission-made rates, or failure to keep accounts in accordance with the system prescribed by the Commission. We may say, in passing, that the provision of Section 22 referring to private actions for charging excessive rates

clearly refers to the excessive rates next therein above referred to—that is, rates in excess of those established by the Commission.

Such then was the situation in California, both actual and historical, when the constitutional amendment of October 20, 1911, took effect. We feel that we have shown that neither by constitutional nor statutory provision was any right of action given a shipper for the mere charging of the greater rate for the lesser distance, provided the rate so charged had been fixed by the Commission; and further, that if it were a violation of the Constitution to charge a Commission-made rate for a greater than for a lesser distance, such violation was punishable only at suit of the State to recover a penalty in the nature of a fine.

It was suggested, rather than insisted upon that Section 73a of the California Public Utilities Act above referred to might have authorized a Justice of Superior Court to take and hold jurisdiction of plaintiff's cause of action.

Section 73a reads as follows:

“In case any public utility shall do, cause to be done or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the constitution, any law of this State or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected thereby for all *loss, damages or injury*

caused thereby or resulting therefrom, and if the Court shall find that the act or omission was willful, the Court may in addition to the actual damages award damages for the sake of example and by way of punishment. An action to recover for such loss, damage or injury may be brought in any Court of competent jurisdiction by any corporation or person.”

It will be observed that this section is prospective and not retrospective. The act of which it was a part did not take effect until March 23, 1912.

At the time the shipment moved and at the time the charges were collected the California Act then in effect was the so-called Eshleman Act—Chapter 20 of the Statutes of 1911.

Section 38 of the Wright Act confers no right of action for damages save for violation of that act.

The section of the Eshleman Act corresponding to Section 73a of the present Public Utilities Act is:

Sec. 43:

“In case any railroad or other transportation company subject to this act shall do, cause to be done, or permit to be done any matter, act, or thing *in this act* prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad or other transportation company shall be liable to the person or persons, firm or corporation injured thereby *for the damages* sustained in consequence of such vio-

lation; and in case such railroad or other transportation company shall be guilty of discrimination as by this act defined, then, in addition to such other damages, such railroad or other transportation company shall be liable to the person, firm or corporation injured thereby in punitive damages in the sum of not less than one hundred dollars, nor more than five thousand dollars, to be recovered in any Court of competent jurisdiction in any county into or through which such railroad or other transportation company may run or operate; provided, that any such recovery as herein provided shall in no manner affect a recovery by the State of a penalty provided for such violation."

It would seem, therefore, to be manifest that a Court cannot found its jurisdiction upon any of the provisions we have just quoted, since the one in force when the action was brought was prospective and neither preservative nor declaratory of any right of action for damages arising out of a violation of a constitutional provision, and since also the law of March 23, 1912, does not even by the most strained construction purport to give any right of action for damages arising out of a violation of the Long and Short Haul provision of the Constitution.

It follows with equal certainty that Section 74a of the present California Public Utilities Act is of no avail to the plaintiff because it had no "right, penalty or forfeiture arising or accruing under any law of this State."

IV.

The Court erred in sustaining a general demurrer to the tenth separate defense of plaintiff in error (Record, p. 344) which pleaded that each assignor or defendant in error paid without protest the charge complained of, and that the charge was collected by defendant in the belief that it was the lawful rate and was the amount specified by tariffs duly established by the Railroad Commission, and in each case was no more than a reasonable compensation for the service performed.

On this point we contend that payments voluntarily made of charges assessed contrary to the long and short haul clause of the State Constitution, even though that clause as originally enacted, or as amended, and giving it the full force contended for by defendant in error, can not be recovered by action in Court. We cite *Brumagin vs. Tillinghast*, 18 Cal. 269, the leading case in California on voluntary payments, and a case which has been very frequently cited and followed in this and other States.

A case very similar to the present one is *Killmer vs. New York Central*, 100 N. Y. 395, where the payments were sometimes made before the delivery of the goods to the consignee, and some times afterward, and were made without objection during a period of thirteen years without any complaint or remonstrance on the part of consignees or shippers. The New York Court of Appeals held that there could be no recovery, and in the course of the opinion referred to a number of English cases. One

of them, *Parker vs. Great Western*, 7 M. & G. 253, differs (p. 275) from the present case in that in the *Parker* case the plaintiff protested against the excessive charge, and tendered what he insisted was the lawful charge; in other words, he paid under protest, and in that case the Court held that the payments were not voluntary.

We also refer to the case of *Kenneth vs. Railroad Co.*, 98 Am. Dec. 382; 15 Rich. (S. C.) 294. In that case there was no protest, and the payments were held to be voluntary. The Court in the opinion reviews at some length the authorities on voluntary payments.

A recent case is that of *Hardaway vs. Southern Ry. Co.*, 73 S. E. 1020, decided by the South Carolina Supreme Court in 1912, wherein the Court says:

“It follows that when one undertakes to recover money which he has paid to another, he must allege and prove some fact or facts which will take his case out of the general rule above stated. Otherwise his complaint will be subject to demurrer for insufficiency.”

We cite also the cases of *Dubose vs. Railway Co.*, 50 Ga. 304; *Potomac, etc., Co. vs. Railway Co.*, 38 Md. 255; and *Knudson, etc., Co. vs. Railway Co.*, 149 Fed. 973.

In the case at bar defendant in error manifestly understood that there was a rule forbidding recovery of voluntary payments, for it attempts to meet the rule by the allegations of paragraph IV of each count, to the effect that a demand for the freightage

was made and that the money was paid before delivery of the goods. We submit, however, that under the decision of the California Supreme Court in *Hanford Gas & Power Co. vs. City of Hanford*, 163 Cal. 104, the allegations are not sufficient. First, it does not appear from the complaint that the assignors of the defendant in error had any interest whatever in the goods on which freightage was demanded. For aught that appears in the complaint, the plaintiffs may have been mere factors or commission men, or otherwise not interested in the case on account of any property, general or special, therein. The rule laid down in the *Tillinghast* case, 18 Cal. 269, is that a payment is voluntary unless made to protect the person or property of the payor. In the *Hanford* case just referred to the Court referring to several California cases, said on pages 112-13 of the opinion, that the general allegation as to menace, compulsion and coercion is not sufficient to show any of these characteristics.

We therefore submit that it was error for the District Court to refuse plaintiff in error the right to submit evidence in support of the allegations of its special defense No 10 (Record, p. 344).

V.

As to the shipments herein involved which moved after October 10, 1911, collection of the charges complained of can be defended on two additional grounds:

1 *That the charges collected were those existent on October 10, 1911, having been legally established by the Commission.*

2 That the Commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually make a series of orders, some of them preceding the filing of petitions for relief from the long and short haul clause and some of them afterward, but all of them with the intention of preserving the status of the rates then being charged by plaintiff in error, until it could be determined by the Commission whether, and, if so to what extent, it was entitled to relief.

Under the first subdivision of the foregoing head we feel that we have already shown the Court that the amended Sections of Article 12, which took effect October 10, 1911, expressly adopted and made a part of themselves the provisions of the then existing Railroad Commission Act, the Eshleman Act, and that the provisions of this Act are to be considered *in pari materia* with the provisions of the amended sections to the Constitution, not as a mere supplement to those sections but as an integral part thereof. Therefore whereas by Section 15 of the Eshleman Act power is given to the Commission to fix rates, and by Section 18, hereinbefore quoted, it is provided that all rates established by the Commission shall remain in effect until changed by the Commission, it was evidently the intention of the Section not to give the long and short haul clause therein contained an immediate and arbitrary operation without giving the carriers an opportunity to apply for relief, and without giving the only relieving body the opportunity of making such detailed investigation of the rates involved as to it

seem fit and under its general rate fixing power meantime to preserve the status if it saw fit so to do.

An explanation of this somewhat unusual inclusion of an existing statute in a Constitution merely by reference to its title and date of passage is found in contemporary history. At the time the amendments to Article 12, which were submitted to the voters at the special election of October 10, 1911, were framed by the Legislature and submitted to the people for adoption, the Eshleman Act of February 10, 1911, had already been passed and was in effect. At the same session of the California Legislature in 1911, the Legislature prepared and presented to the people for ratification and adoption at the same special election, other amendments to the constitution, including therein a clause providing for the reference of legislative acts to the people for approval or disapproval by popular vote. These amendments were adopted on October 10, 1911. The referendum amendment is Section 1 of Article 4. In aid of the referendum theory, the referendum amendment provided:

“No act passed by the Legislature shall go into effect until ninety days after the final adjournment of the session of the Legislature which passed such act,” except acts calling an election and urgency measures therein defined.

The Legislature was then in this situation: By the amendments to the Railroad Commission Sections, which it proposed to the people, it changed in many respects, the theory and method of railroad

and public utility regulation. By the referendum section, which was proposed at the same election, it provided in effect that no law in aid of the constitutional provisions respecting the Railroad Commission, should go into effect until ninety days after the final adjournment of the Legislature passing it. Therefore lest it might be successfully contended in the event of the adoption of the Railroad Commission amendments that that adoption worked an implied repeal of the then existing Eshleman Act, and in view of the possibility of the adoption at the same election of the referendum provision, which would have precluded the enactment and taking effect of a new Railroad Commission Act for at least the time required to convene the Legislature and pass the act, and in addition thereto ninety days thereafter within which referendum petitions might be filed, it was thought best to preserve the provisions of the Eshleman Act intact by making them a part of the constitutional provision, as was done, and holding them thereby in effect until the Legislature might supplement, change or modify the Eshleman Act by new legislation. This forethought on the part of the Legislature accounts for the fact that we find the Eshleman Act not only continued in effect after October 10, 1911, but in effect and by reference made a part of the amended Railroad Commission sections.

Therefore we take the position that the Court below erred in sustaining the demurrer of the defendant in error to the eighth further and separate defense (Record, page 343), pleading that the rates

charged and collected after October 10, 1911, were rates which prior thereto had been established by the Railroad Commission and had not been changed, and that the Court also erred in refusing to permit the plaintiff in error to show that such rates had been established prior to October 10, 1911.

Another reason why we believe that defendant in error has no cause of action as to the rates in question collected after October 10, 1911, is that we take the position that the Railroad Commission did after investigation grant relief against the amended long and short haul clause as to such rates as were covered by application filed within a prescribed time and continued such relief in effect pending the final determination by the Commission of the extent to which it should go, which final determination, as the record shows, had not been reached at the time of the trial.

The seventh separate defense of the plaintiff in error (Record, page 342) was to the effect that as to all such shipments the Railroad Commission had authorized the defendant after investigation to charge more for the shorter than for the longer distance. Demurrer to this defense was overruled and when plaintiff in error endeavored to sustain the defense on the trial it did so by offering a chain of orders and petitions, all of which are hereinbefore referred to, and all of which were on objection refused admission in evidence. The learned District Judge proceeded upon the theory that Section 21 of Article 12, as amended October 10,

1911, required for relief from its provisions, first, an application, and, second, an investigation by the Commission. The proviso in the amended Section 21 has already been cited: "Upon application such company may in special cases, after investigation" be authorized to deviate from the long and short haul provision.

The learned District Judge in the discussion which preceded the offering of this series of orders (Record page 397) stated that the investigation referred to must be upon application by the company, and apparently he believed that the Constitution required the investigation to follow the application and that it was not permissible for the investigation to precede the application.

Before briefly referring to the series of papers offered on this head, it might be well to consider that the Railroad Commission at the time of the adoption of the amendment of October 10, 1911, was a duly created and a fully organized body; that it had custody of and complete access to and presumed familiarity with all of the tariffs of all of the railroad carriers in so far as such tariffs applied to California intrastate movements, and that it was, as has many times been said by the Federal Courts of the Interstate Commerce Commission, presumably an expert body with unusual familiarity with rates and conditions. In other words the Commission was the repository of an immense amount of information bearing directly on the question of whether in various parts of the State special cir-

cumstances and conditions existed warranting its granting relief from the inflexible operation of the long and short haul clause.

The word "investigation," therefore, as we view it, does not and should not in this connection have a construction put upon it giving it the dignity of a formal proceeding or requiring it to be accompanied by the necessary elements of due process of law as applied to the determination of a contested question of law or fact. Nor we take it are the words "upon application" contained in the amended section to be given the strict construction, placed upon them by the District Judge so as to require application to precede investigation no matter what meaning may be given to the word investigation. Here is a body having jurisdiction of the subject of fixing rates. Those rates once fixed cannot be deviated from by a carrier and must be paid by the shipper or consignee. The shipper or consignee has no recourse except upon formal application to it as provided both in the Eshleman Act and in the Public Utilities Act, which succeeded that act. Upon such application the carrier is entitled to notice of the hearing and the opportunity to produce witnesses, thus fulfilling the requirements of due process of law. The Commission itself, however, in an investigation, as distinguished from its formal proceedings, is not so regulated and trammled. Considering the manifest injustice to the carrier of attempting to make an inflexible long and short haul clause take effect immediately on its adoption at an election held on a given date,

we submit no rigid construction should be indulged in to bring about such a result. Therefore we take it that the word investigation as here used should be given its broad and general sense and should not be construed to be equivalent to a formal proceeding. This view is borne out by the following cases:

In *Wright vs. City of Chicago*, 48 Ill. 285, there was considered a street assessment. Under the Illinois statute which provided that the Commission of Public Works should investigate whether there was any real estate specially benefited, in the Commissioner's report the word investigation was not used, but it showed that they found and established benefits, when or in what manner the facts not being stated.

Says the Court on page 290 of the official report:

"The fourteenth section of chapter 2 of the amended charter, does not require, for the purposes of investigation, that the commissioners of public works should go upon the ground, or streets sought to be improved, and there investigate. Full investigation of a subject, be it moral, political, or philosophical, can generally be better pursued in the closet than in the open air, in crowded streets. Eminent lexicographers define investigation to be the action or process of searching minutely for truth, facts, or principles; a careful inquiry to find out what is unknown, either in the physical or moral world, and either by observation and experiment, or by argument and discussion. Thus we speak of

the investigations of the philosopher and the mathematician; the investigations of the judge, the moralist, and the divine, and, may we not add, of boards of commissioners of public works?

“It must be presumed, these commissioners, as they were sworn to do, thoroughly investigated this matter in their office, and discussed, fully, the merits of the whole subject, knowing, as they are presumed to have known, all the peculiarities of the locality, and familiar with the subject.

“The result of their investigation was this report to the common council, accompanied by the required ordinance.” * * * * *

In *Johnson vs. Railway Company*, 130 Wis. 492, the case of *Wright, supra*, is cited as a definition of the word investigation. The Court also says:

“No limitation was placed upon the manner of investigation or methods to be employed in obtaining information, and it appears that the investigation made was for the purpose of obtaining the desired information. ‘Investigation’ is defined: ‘To inquire into systematically; ascertain by careful research.’ *Stand. Dict.* 917. ‘To search out; to inquire into; to examine; to scrutinize.’ *Worcester, Dict.* 777. ‘To follow up; to pursue; to search into; to inquire and examine into with care and accuracy; to find out by careful inquisition.’ *Webster Dict.* 713.”

The evidence offered and rejected respecting the rates collected after October 10, 1911, was in brief, as follows:

1 Plaintiff in error endeavored to show by the Witness Gomph (Assignment of Error No. 8, Record page 516) that the letter shown the witness was a correct copy of a letter sent to the California Railroad Commission, on May 7, 1909, by the Southern Pacific Company, transmitting tariffs therein specified, and that those tariffs were filed with the Commission. The list of tariffs specified in the letter includes the tariffs evidencing all of the charges here in controversy.

2 Plaintiff in error offered to show by the Witness Gomph (Assignment of Error No. 9, Record page 517) the contents of such letter, which contained the numbers of said tariffs.

3 Plaintiff in error offered to show by Witness Gomph that all of the tariffs mentioned in said letter were actually filed with and remained on file with the Railroad Commission until the Commission entered an order on January 1, 1909, approving and establishing such tariffs. (Assignment of Error No. 10, Record page 527.)

4 Plaintiff in error then offered an order made by the Railroad Commission January 11, 1909 (Assignment of Error No. 11, Record page 527) in which receipt of the tariffs is acknowledged, and providing "That the said rates, fares and charges shall be published by said carriers respectively, as required by said Act, and shall be the lawful rates,

fares and charges of said carriers respectively.” (Record page 530.)

These four offers were preliminary to the chain of orders and applications made and filed after October 10, 1911, and were made to show what tariffs had been established by the Commission prior to October 10, 1911, and were in existence on that date so far as concerned the claims herein sued on.

5 Plaintiff in error then offered (Assignment of Error No. 2, Record page 481) a notice by the Railroad Commission, dated October 26, 1911, reciting the provisions of the amended Section 21 of Article 12, and ordering carriers which had schedules on file in violation of such provisions to file on or before January 2, 1912, if carriers desired to justify deviation from the long and short haul rule, an application or applications to be relieved from the provisions of the amended Section 21, the form of application being prescribed.

6 Plaintiff in error then offered (Assignment of Error No. 3, Record page 486) an order of the Railroad Commission, dated November 20, 1911, granting permission to carriers until January 2, 1912, to file such changes in rates and fares as would occur in the ordinary course of their business “*continuing under the present rate bases or adjustments higher rates and fares to intermediate points*”, and providing that in so doing discrimination against intermediate points would be not made greater than that in existence October 10, 1911.

7 Plaintiff in error then offered Southern Pacific Company's petitions No. 3, 9, 10, 30 and 40 (Assignment of Error No. 4, Record page 488), which were in the form prescribed by the Commission and covered the rates here in controversy. Each of these petitions asked for authority to continue higher rates at the intermediate points therein described than the through rates to more distant points. These petitions were filed on December 30, 1911.

8 Plaintiff in error then offered a copy of the Minutes of the California Commission of January 2, 1912, (Assignment of Error No. 12, Record page 506), showing that the Commission on that day did begin a general investigation of long and short haul rates in California, a number of the California carriers, including Southern Pacific Company, being represented. It appears from the record that this investigation has not yet been terminated.

9 Plaintiff in error then offered an order of the Railroad Commission, dated January 16, 1912 (Assignment of Error No. 6, Record page 507), which order extended until February 15, 1912, the time for filing applications for relief from the long and short haul provision, providing (Record page 509) that the railroads so filing *might continue under the present rate bases or adjustments higher rates or fares at intermediate points provided that in so doing the discrimination against intermediate points was not made greater than that in existence October 10, 1911.*

To all of these offers objection was sustained on the theory of the Court that these orders did not constitute an investigation within the meaning of the amended Section 21.

Closely analyzed there are three periods to be considered:

1 The period between October 10, 1911, when the amended Section 21 took effect, and November 20, 1911, when the order of the Railroad Commission was entered absolving carriers who filed applications from conforming their tariffs to the long and short haul provision, pending hearing of such applications.

2 The period between October 26, 1911, when the order next above referred to was entered, and December 30, 1911, when the plaintiff in error actually filed applications with the Commission covering all of the rates herein involved, which were collected after October 10, 1911.

3 The period between December 30, 1911, the date of the filing of such applications, and January 16, 1912, the date of the order of the Commission again extending relief to carriers who filed such applications until the Commission could determine upon the extent of the relief prayed for by said applications, and permitting continuance of higher intermediate rates.

It would seem clear, therefore, that by the order of November 20, 1911, the Railroad Commission, did, in so far as it had the power so to do, expressly authorize carriers who had on file or who

subsequently filed within the limits of the order, applications to be relieved, a continuance of the rates existing on October 10, 1911. It seems equally clear that on January 16, 1912, the Railroad Commission entered an order by which, in so far as it had power so to do, it confirmed the order of November 20, 1911, and at least held in suspense all rates embraced in applications for relief theretofore filed with it, and also established or re-established such rates, pending determination by it on such applications.

No matter what view the Court may entertain of the necessity of an application prior to the relief order under amended Section 21, it would seem that in as much as the applications of the plaintiff in error were on file on December 30, 1911, and as the Commission on January 16, 1912, entered the order above referred to, that as to every claim of the defendant originating after January 16, 1912, the Commission has after application and after investigation entered an order temporarily at least continuing the rates described in the application of December 30, 1911, in full force and effect. The order of January 16, 1912, appears clearly to be a relieving order, even adopting the construction of the Court below as to the applications which were then on file with the Commission. Those applications covered all of the cases here involved. We submit that the Court cannot presume that the Commission in making the order of January 16, 1912, acted capriciously or in disregard of its duties to the public or without investigation, and we repeat

that all of the investigation required by the amended Section 21, so far as this order is concerned, would be met by the investigation by the Commission itself, ex parte, made, from its own records and supplemented by its general knowledge of the California situation, and by the relief application on file with it.

If we be correct in saying that the order of January 16, 1912, amounted to a relief, after investigation, as to the rates specified in the applications filed by plaintiff in error on December 30, 1911, we next have to inquire as to the effect of the order of November 20, 1911, and this inquiry we make entirely irrespective of our point that the rates in existence on October 10, 1911, were preserved in force by the incorporation of the Eshleman Act in the Constitution.

Our inquiry now is solely addressed as to whether on November 20, 1911, at the time of the making of the order which continued in force higher rates at intermediate points as to such carriers who thereafter filed applications, *the Commission had in and of itself the power to fix rates pending investigation as to the advisability of continuing them in effect, though they did not conform to the long and short haul clause*, which rates so fixed should be the legal rates and would give the person paying them no ground of action based on the theory that they were excessive or in violation of the constitutional provision.

Here we must again consider that by the provisions of the amended Section 22, the Commission

was given power to establish rates of charges; that also by the same amended Section it was provided

“no provision of this constitution shall be construed as a limitation of the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind, or different, from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.”

The amended Section 22 thus provides that the Eshleman Act shall be considered with reference to the amended Section 22 and any other constitutional provisions becoming operative concurrently therewith “and that said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the constitution, and of all other provisions adopted concurrently herewith.” *The intention of the constitution, therefore, seems clearly to be that the Eshleman Act is preserved in effect not only as a part of the amended Section, but also as though it had been passed by the Legislature after the adoption of the amended section.* It follows that the Legislature, if it had passed the Eshleman Act after the adoption of the amended section, had the right to confer additional powers upon the Commission *not limited by any provisions of the constitution.* It also follows that

the provisions of Section 15 of the Eshleman Act, giving the Commission power to establish rates, were at the time of the order of November 20, 1911, not limited by any provision of the constitution. Reading the Eshleman Act as an entirety it is apparent that the Legislature by it intended to confer upon the Railroad Commission the broadest and most untrammelled power with respect to the fixing of rates within the limitations placed upon such rate fixing power by the Federal Constitution.

This question first came up in the California Supreme Court in the case of *Pacific Telephone & Telegraph Company vs. Eshleman, et al.*, as Railroad Commissioners, a certiorari proceeding, reported in 166 Cal., beginning at page 640. The opinion is quite long but is the first exposition by the California Supreme Court of the powers of the Legislature, under the amended Section 22 of Article 12 of the California Constitution. It may be noted that while the main opinion was written by Justice Henshaw, concurred in by Justices Lorigan and Melvin, Justice Sloss wrote a concurring opinion in which he did not assent entirely to the reasoning by which the result announced in the main opinion was determined. Justice Shaw concurred with Justice Sloss, and Justice Angelotti dissented, but none of the learned justices dissented from the language used by Justice Henshaw on page 658 of the opinion, as follows:

“In view of these considerations we regard the conclusion as irresistible that the constitution

of this State has in unmistakable language created a Commission having control of the public utilities of the State, and has authorized the Legislature to confer upon that Commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the constitution to all other kinds of property and its owners. And while, under our republican form of government, a form of government under which the three departments—administrative, executive and judicial—have in the past one and all been controlled by the limitations of a written constitution. (*In re Duncan*, 139 U. S. 449, 35 L. Ed. 219, 11 Sup. Ct. Rep. 573), it is perhaps the first instance where a constitution itself has declared that a legislative enactment shall be supreme over all constitutional provisions, nevertheless this is but a reversion to the English form of government which makes an act of parliament the supreme law of the land. It was at one time argued as to such acts of parliament that while not otherwise invalid they would be decreed invalid if ‘contrary to natural justice or to natural right.’ But as this determination itself involved a resort to the courts and thus made the decision of the courts to that extent superior to the law of parliament, the present day juriconsults are agreed that an act of parliament is not controlled by natural right or natural justice, but is controlled solely by what is deemed to be

expedient and wise to the law-making power itself. (Bryce's American Commonwealth, Chap. 23.) So, here, the State of California has decreed that in all matters touching public utilities the voice of the Legislature shall be the supreme law of the land.

“Therefore, the following conclusions appear to be irresistible: That when the constitution itself, as here, declares that a legislative enactment touching a given subject shall not be controlled by any provisions of the written constitution, such a legislative enactment addressed to that subject *ex proprio vigore* carries with it all the force of an act of parliament.”

We, therefore, assert with confidence that as the amended Section 22 in terms said that the provisions of the Eshleman Act “shall have the same force and effect as if the same been passed after the adoption of this provision of the constitution and of all other provisions adopted concurrently herewith”, it inevitably follows from a consideration of the provisions of the Eshleman Act in the light of the decision of the highest court of the State, which we have just cited, and which under familiar rules of construction should in this case be conclusive upon this Court, that the Commission under the powers conferred upon it by the Eshleman Act did by its chain of orders offered by plaintiff in error, not only endeavor to relieve from whatever immediate operation might be claimed for the long and short haul clause, but also that it did

establish the rates being charged by the carriers on October 10, 1911, as the rates which should govern such carriers who choose to file applications until their applications could be finally determined and passed upon. It would be strange, indeed, if a Commission possessing the broad and constitutionally conferred powers of the California Railroad Commission did not have the power to relieve carriers from a construction of the long and short haul clause which made that clause, standing alone and without consideration of the other provisions of the constitution of which it is a part, and without consideration of the provisions of the Act expressly adopted and continued in force by that constitution, an arbitrary and automatically operating provision, which would at once make invalid that which theretofore was valid, and plunge into chaos the entire rate structure of the California carriers.

VI.

The motion for non-suit should have been granted as to the shipments moving after October 10, 1911, on the third ground (Record page 370) that it did not appear from the evidence taken in connection with the admissions made by the pleadings that the California Railroad Commission had never prescribed that defendant might in any case or in any of the cases referred to in plaintiff's causes of action be relieved from the prohibition of the California Constitution directed against charging less for the longer than for the shorter haul.

Each of the counts in plaintiff's complaint relating to a shipment moving after October 10, 1911,

contains the following allegation, sample of which is in count No. 118 (Record page 326):

“That defendant has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; that said Railroad Commission has never prescribed that defendant might in any case whatsoever be relieved to any extent from the prohibition of the Constitution of California to charge less for the longer than for the shorter haul.”

In defendant's answer paragraphs IV and V (Record pages 336 and 337) contain the following denials:

IV.

“Defendant denies that it has never been in any case authorized by the Railroad Commission of the State of California to charge less for longer than for shorter distances for the transportation of property; and in that behalf alleges that in each case stated in said complaint where for the transportation of property it charged more for the shorter distance than for the longer distance, in the same direction, of the same amount (124) and class of property, it had been expressly so authorized to do by said Railroad Commission.

V.

“Defendant denies that said Railroad Commission of the State of California has never

prescribed that defendant might, in any case whatsoever, be relieved to any extent from the prohibition of the Constitution of the State of California to charge less for the longer than for the shorter haul, and in that behalf alleges that in the case of all of the shipments described in said complaint as having moved or having been delivered after October 10, 1911, the said Railroad Commission had prescribed, by an order duly given and made, that the defendant might be relieved from the prohibition of the Constitution of California against charging less for the longer than for the shorter haul."

It is evident that even on the theory of the case entertained by the defendant in error its counsel saw the necessity as to the shipments moving after October 10, 1911, of negating the idea that the Railroad Commission might have granted relief to the carrier and authorized the carrier to charge more for the shorter than for the longer distance.

Under familiar principles of pleading we submit that it was incumbent upon the plaintiff to make this showing of non-action by the Commission affirmatively as it was an essential part of its case in chief. It is no answer to this to say that the plaintiff in error when it opened its case endeavored to make this showing because it does not appear that the orders offered by the defendant in error were all of the orders made by the California Commission. It only offered certain orders, then believing and still believing them to constitute a showing of relief by the Commission. Its selection of

those orders did not, however, relieve the plaintiff below of the necessity of proving the allegation affirmatively made by it in its complaint and denied by the defendant. We submit, therefore, without extended citations of authorities, that even if the contention of the defendant in error respecting the proper construction of the amended Section 21 of the California Constitution be correct, it is essential for the plaintiff suing for the recovery of so-called excessive rates under that section to show not only that the rate charged and collected was a rate in excess of the lesser charge for the greater distance, but also that the Railroad Commission by virtue of the power conferred upon it by the amended Section had not relieved the carrier from the prohibition against charging the greater rate for the lesser distance. While this is not one of the most salient points in the case we submit that it is not only worthy of consideration but also warrants in any event a reversal of the judgment as to all of the causes of action involving shipments moving after October 10, 1911.

VII.

The complaint in this case is fatally defective because it does not allege that the plaintiff or any of its assignors had applied to and secured from the California Railroad Commission a reparation order based on the payment of excessive charges.

For that reason the Court erred in sustaining the demurrer to the sixth separate defense (Record p. 341), which pleaded that no such reparation order had been applied for or obtained.

We take the ground that, at least since March 23, 1912,—after which date this suit was instituted—and perhaps before, a plaintiff who had paid a greater charge for a given distance than the carrier was charging for the same class of property for a greater distance over the same line or route, but who nevertheless had paid the rate fixed by the Railroad Commission of California for the actual movement, and who claims reparation on the ground of a violation of the Long and Short Haul clause either of the Constitution of 1879 or the amendment of 1911, must first apply to the Commission for and secure an order prescribing the amount of reparation to which he is entitled. We claim that the courts have no jurisdiction to entertain a cause of action based on a transaction such as we have described, unless it appears affirmatively by both pleading and proof that such reparation order has been obtained. We claim further that to hold otherwise would be destructive of the system of rate-fixing and enforcement adopted by the state, and would result in the very evils of rebating and discrimination which it is the chief object of the constitutional and statutory provisions to guard against.

The Eshleman Act, effective February 10, 1911, contained in Section 28 a provision for an application to and reparation on order by the Commission. The Constitution of 1879 was silent on that subject. Section 21 of the constitutional amendment of 1911, however, provides:

“Nothing herein contained shall be construed to prevent the Railroad Commission from order-

ing and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being *excessive* or discriminatory, provided no discrimination will result from such reparation."

thus clearly showing the intention of the framers of the amendment to confine to the initial jurisdiction of the Commission cases for the recovery of an excessive charge, for only by uniform rules and practice in a single centralized body could discrimination by refunds be avoided.

Section 71 of the California Public Utilities Act effective March 23, 1912, has already been quoted; it provides for application to and reparation order by the Commission for the refunding of *excessive* as well as discriminatory amounts. The word "excessive" is used with deliberation, for its meaning is different from that of the word "discrimination". In this respect the framers of the amendment of 1911 and of the Public Utilities Act did not follow the provisions of the Interstate Commerce Act, upon which are based the numerous decisions of the Commission and the courts defining the respective jurisdictions of commission and courts.

Sections 13, 14 and 15 of the Act to Regulate Commerce provide only for applications to the Commission by complaint "of anything done or omitted to be done by any common carrier subject to the provisions of this act, in contravention of the provisions thereof", and for the award (Section 14)

of "damages"; and in Section 16 that if, after hearing, the Commission shall determine that the complainant is entitled to "an award of damages under the provisions of this act for the violation thereof", the Commission shall make an order directing the carrier to pay the sum, etc. The method of enforcement of this order is by suit in court.

The oft-construed provisions of the Interstate Commerce Act giving concurrent jurisdiction to courts, and the decisions referring to those provisions, may be differentiated from the provisions of the California Act. The provisions of Section 8 of the Interstate Commerce Act are that if a common carrier does anything by the act prohibited or declared to be unlawful, or omits to do anything by the act required to be done, "such common carrier shall be liable to the person or persons injured thereby, for the full amount of damages sustained in consequence of any such violation."

The provisions of Section 73-a of the California Act, giving a right of action "for actual damages", and in some cases for exemplary damages, for violation of the act, do not authorize suit to recover for an excessive or discriminatory charge. The exclusive primary jurisdiction is vested in the Commission by the reparation section. The significance of the word "excessive" as used in the California act with reference to the powers of the Commission in reparation matters, and its omission from the section authorizing court suits, is more ponderous when we come to consider that "excessive" is used

in the sense of the definition of that word given in the Century Dictionary—"exceeding the usual or proper limit, degree, measure or proportion; being in excess of what is requisite or proper"; whereas discrimination lies in subjecting one person or one community to disadvantage as compared with the rights or privileges given another under similar conditions and circumstances.

If it be true, as contended by counsel for claimants herein, that, irrespective of the fact that the intermediate rate charged is a rate lawfully on file with and established by the Commission, the person paying it has the right to recover on the long-and-short-haul clause theory, then we say with confidence that the framers of the Constitution and the statute could not have used a word with more precision than the word "excessive" in conferring primary jurisdiction upon the Commission to entertain such claims. If the right to recover exists at all, it is irrespective of the reasonableness of the rate, and irrespective of whether damages have been suffered by the collection of the rate.

In all of these Long and Short Haul claims it was freely conceded that no charge of unreasonableness per se is made as to the intermediate rate; nor has it been thought necessary in any of them to plead either unreasonableness or damage. Hence we say that it was the deliberate intention of the Constitution not to allow a court to construe tariffs, schedules and classifications, and first to say that there was in effect at the time of the movement to the

intermediate point a lesser rate to a more distant point, and then to say that the lawful rate to the intermediate point was not the rate established by the Commission, but was a rate which the Commission had not established for that point but had, for good and sufficient reasons, established to the more distant point; and finally to give judgment for the plaintiff for the difference, without giving the Commission the opportunity to obey whatever mandate is implied by the Long and Short Haul clause, by taking its option of either raising the through rate or lowering the intermediate rate.

Good considerations of public policy are abundant in support of our claim that the initial application must be made to the Railroad Commission. It is a constitutionally created body; it is the only body in the state having jurisdiction of rates; all of the record evidence necessary in any case under the Long and Short Haul clause is in the files of the Commission itself; it has rate experts and attaches who we must presume are capable of giving it expert and unbiased testimony when the question arises in a Long and Short Haul case as to what the through rate is. It knows also whether, since October 10, 1911, it has, to use the language of Section 22, authorized the carrier to charge less for the longer than for the shorter distance, or to prescribe the extent to which the carrier might be relieved from the general prohibition of the section; more important than all, it alone, if the right to reparation exists in the case of violation of the Long and Short Haul section, can so adjudicate the reparation claims as to pre-

vent the evil of rebating and discrimination which inevitably would arise if one court were permitted to hold our contentions in this case on the general questions of jurisdiction to be correct, and another court were allowed to uphold the plaintiff's position.

With the provisions of the Interstate Commerce Act before them, with the numerous decisions of the Interstate Commerce Commission and of the courts in mind, familiar with the constitutional and statutory history of California legislation on this subject, and with the knowledge of inequality of administration which had resulted in the early stages of rate legislation in other states by leaving courts vested with the power of passing initially on questions involving rates, the framers of the constitutional amendment of 1911 authorized the legislature to vest the power in the Commission to order reparation.

The Interstate Commerce Commission itself has recognized its reparatory powers under the old Long and Short Haul clause of the Act to Regulate Commerce, by granting reparation orders for the violation of that clause in the Lynchburg Cases, 6 ICC 632-46; Gardner vs. Southern R'y Co., 10 ICC 342-51; and other cases; though latterly, since the passage of the amended Fourth Section, the Commission has, by reason of the relieving clauses in the amendment, almost uniformly declined so to penalize carriers, while not disclaiming its power to grant reparation in some cases of that class. (26 ICC 628; 25 ICC 193; 24 ICC 604.)

The term "overcharge" is sometimes used loosely. In modern railroad law, since rate regulation by

means of publicly promulgated tariffs came to be required, "overcharge" has the technical legal meaning of a charge collected by a carrier in excess of the published tariff rate for the service performed. Actions for such overcharge have been sustained in state and federal courts, sometimes on the theory that the publication of the tariff amounted to a contract between the carrier and the shipper, at other times on the theory that the money had been paid or collected by mistake, again, by virtue of specific statutory or constitutional provisions giving a right of action for the overcharge, and sometimes without assigning any particular reason for giving the plaintiff judgment. Never, however, have the Federal Courts or the Interstate Commerce Commission, so far as we have been able to ascertain by quite diligent research, entertained an action or claim for overcharge where the rate collected was fixed by a federal or a state commission or established by the carrier through the medium of such commission, and duly filed and promulgated in accordance with the law and the regulations of the Commission. With confidence we challenge counsel for the claimants herein to cite the Court to such a case.

The Interstate Commerce Commission has held, in *Laning vs. Railway*, 17 ICC 37-39, that for a straight overcharge—that is, one in excess of the lawful tariff—it has jurisdiction concurrent with the courts, on the theory that as against the carrier its published tariff is conclusive of the fact that the higher rate is unreasonable. It must be borne in

mind that the initial jurisdiction of the Interstate Commerce Commission to award reparation is derived solely from the provisions of the Act to Regulate Commerce which we have referred to in this division of the brief, and is not broadened, as is that of the California Commission, to include rates merely "excessive".

We have seen that the act confers upon the Commission the power to make a reparation order for the repayment of an excessive charge. Let us see whether that jurisdiction, primary and irreviewable though it may be, is exclusive. It cannot be doubted, since the decision of the California Supreme Court in *Pacific Telephone & Telegraph Co. vs. Eshleman*, decided December 23, 1913, that the Railroad Commission created by the constitutional amendments of 1911, and whose powers were supplemented by the present California Public Utilities Act, possesses not only powers but jurisdiction which the framers of the Constitution of 1879 never intended to and did not confer upon the Railroad Commission created by that constitution.

Although there was some difference of opinion among the Justices as to other matters, the members of the Court are unanimous in holding that in so far as judicial powers have been conferred upon the Commission within the limits prescribed by the amended sections of the Constitution, those powers are in derogation of the powers theretofore possessed by the courts of the state. Therefore it will not do to say in this case that our claim that an application

to the Commission is a prerequisite to the maintenance of an action for the collection of the claims sued upon is in conflict with the provisions of the Constitution conferring jurisdiction upon courts. In effect, the people, by the adoption of these amendments, and the legislature by amplifying them as it is empowered and commanded to do, have created a new court which, within its jurisdiction and within its constitutional and statutory limitations, is as supreme and exclusive as the Supreme Court itself. That this is true there can be no question, so long as the decision in the Pacific Telephone case remains the law of the state.

Therefore, seeing that there is no constitutional objection to the vesting of this preliminary jurisdiction we claim for the Railroad Commission, let us see whether the conference of the jurisdiction is in its nature exclusive. We have already pointed out that to allow every trial court in the state to pass on Long and Short Haul cases without a preliminary application to the Commission is both inexpedient and subversive of the system of rate regulation and enforcement established by our Constitution. It is no answer to say that the claim we make in this respect is not borne out by the line of federal cases illustrated by *Texas etc. R'y vs. Abilene Cotton Co.*, 204 U. S. 426; *Robinson vs. Baltimore R'y*, 222 U. S. 506; *Illinois etc. R'y vs. Henderson*, 226 U. S. 441; *Morrisdale Coal Co. vs. Pennsylvania Railroad Co.*, 230 U. S. 304; *Pennsylvania Co. vs. International Coal Co.*, 230 U. S. 184; *Mitchell Coal & Coke Co. vs. Pennsylvania Railroad*, 230 U. S. 247, and the federal cases therein cited.

These cases are exactly in line with the claim which we are here making, namely, that where a question involving singleness of practice and uniformity of rate is to be settled, its settlement by the courts amounts to the indirect exercise of a rate-regulating power. In view of the broader scope of the California act than the reparation sections of the Interstate Commerce Act, these decisions have even greater significance in the present inquiry.

The Supreme Court of Indiana, in *St. Louis Southern R'y vs. Patterson*, decided March 12, 1914, reported in 104 NE 512, which involved the question of overcharges under an interstate tariff, after reviewing the federal decisions said:

“The action declared on in the seventh and eighth paragraphs here shows a contention relating to the lawful construction of an interstate tariff. Such construction would require the court to elucidate and declare the true meaning of the rate. *Terre Haute etc. Co. vs. Erdel*, 158 Ind. 344, 62 NE. 706. The authority to decide a matter involves the power to make an erroneous decision. It is manifest that the courts of Indiana might adopt appellee’s construction of the rate, while those of Missouri might adopt appellant’s. These different constructions would destroy the uniformity in rates sought by the enactment of the interstate act.”

It matters not in the case at bar that the published tariff rates to the intermediate and the more distant points were admitted by the defendant’s answer.

They might as easily have been denied, and it would then have become the duty of the Court to determine what the terminal rate was. This would have involved the inspection and construction of tariffs, classifications and schedules, for which the Commission is peculiarly fitted, and which the Legislature has deliberately committed to the Commission under constitutional authority.

If a Justice of the Peace in a township in Kern County might decide that the lawful tariff rate was $37\frac{1}{2}$ cents per hundred pounds on a certain commodity from San Francisco to Los Angeles, and give judgment for the difference between that and the higher intermediate rate charged on the same commodity to Bakersfield, a Justice in the adjoining township, or in any other township between San Francisco and Los Angeles where such a higher intermediate rate existed, might, after a sage inspection of the tariff schedules and classifications—complicated publications, on the construction of which even expert traffic men often differ—decide that the through rate from San Francisco to Los Angeles on the same commodity was more or less than $37\frac{1}{2}$ cents—a result which we can see at once would bring about confusion and discrimination.

Further, Commissions frequently order reparation to all persons of a given class, although only one of those persons may have applied to the Commission and brought the excessive or discriminatory charge to the attention of the Commission. It is hardly necessary to say that a court has no power to do this.

No railroad man of today desires to go back to the days of rebating and discrimination. There was nothing *malum in se* in those practices but economically were more hurtful to the railroads than they were to the people served by them. During that period railroad credit was at its lowest ebb, and receiverships were frequent. For the Court to hold that by reason of greater diligence on the part of a shipper or his attorney, community prejudice against one of the parties, greater ability of one attorney or the other, or neglect or disinclination to obtain review of judgments, one shipper may obtain the benefit of a rebate from published tariff rates by using the pretense of the Long and Short Haul clause, while his neighbor may be deprived of that benefit, even though he seeks to obtain it in a lawful way, is merely to encourage another form of discrimination. It is for the purpose of controlling that feature of rate regulation by a centralized body, presumably expert and impartial, that, as we claim, the plaintiff here had no standing in court until it first secured from the Commission an order to refund what it claims to be an "excessive" charge—a charge respecting which it does not allege that he was damaged, and as to which it does not claim unreasonableness.

Our view that the powers of a commission in such respects are exclusive, even though the act does not specify that they are exclusive, is borne out by a number of cases. The jurisdiction of such commissions under the statutes of other states has been held exclusive in nearly every instance, and the

reasoning of those cases is applicable, we submit, to the situation at bar. In nearly every instance the grant of power made to the commission was a grant which was not in terms "exclusive".

State vs. Chicago St. Paul, etc. Railway Co., 19 Neb. 476—application for mandamus to compel defendant to stop trains and build suitable depot, etc. The act creating the Board of Railroad Commissioners gave them the "general supervision of all railroads", and provided that they should "inquire into any neglect or violation of the laws of this state by any railroad corporation doing business therein". Also that "whenever in their judgment * * * change of its houses or stations * * * is reasonable and expedient * * *" they should "inform said railroad corporation of the improvements and changes which they adjudge to be proper". The statute also provides for a previous hearing on the question. On demurrer to complaint, the Court said (page 484):

"Here is a special tribunal created for the very purpose of exercising jurisdiction in such cases, and its powers must be exhausted before this court would be justified in interfering."

This statute did not say "exclusive" jurisdiction or supervision.

People vs. B. H. R. Co., 172 N. Y. 90. Mandamus will not lie in the first instance upon the application of aggrieved persons for the purpose of compelling restoration of continued train service, for the board of directors has discretion in the matter, an abuse

of which must be remedied by the board of railroad commissioners. The New York act gave the Commission power, upon due notice and after hearing, to determine whether “* * * any change in the rates of fare for transporting freight or passengers, or that any change in the mode of operating the road and conducting the business is reasonable and expedient in order to promote the security, convenience and accommodation of the public”, and provided for enforcement of its orders by mandamus. The Court pointed out that the board had the power of personally investigating the company’s books, and were supposedly skilled in passing on such questions. And held that relator had mistaken his remedy, “for it (his grievance) should have been presented to the railroad commissioners, who have been given by the legislature an authority which the Court does not possess of making a determination in relation to grievances which parties think they have by reason of the manner in which the directors have disposed of the questions.” This statute does not in terms confer “exclusive jurisdiction”.

Grand Trunk Railway Co. vs. Perrault, 36 Can. Supp. Ct. 671: Action to compel defendant to establish and maintain farm crossing for use of plaintiff in passing over defendant’s road which intersected plaintiff’s farm. Defendant contended and Court held that the exclusive jurisdiction was in the board of railway commissioners. That statute provided:

“The board may, upon the application of any landowner order the company to provide and construct a suitable farm crossing across the railway, whenever in any case the board deems it necessary for the proper enjoyment of his land on either side of the railway, and safe in the public interest; and may order and direct how, when and where, by whom and upon what terms and conditions, such farm crossings shall be constructed and maintained.”

The Court lays stress upon the fact that the act provided that the board's determination of any fact should be binding and conclusive on all courts, and if there existed concurrent jurisdiction a world of conflict and confusion would ensue.

Grand Trunk R'y Co. vs. McKay, 34 Can. Sup. Ct. 18: Held that railway committee had exclusive power to regulate speed of trains in cities, under the statute which provides that they *may* “regulate and limit the rate of speed at which trains and locomotives may be run in any city * * *”

Bangor vs. Railway Co., 97 Me. 163: The Maine laws provide that public crossings shall not be established “unless after notice and hearing the railroad commissioners adjudge that public convenience and necessity require it”. Also, that when any way is laid out across a railroad, the commissioners shall determine the manner and conditions of crossing such railroad. This was a petition to compel defendant to construct a railroad crossing. Plaintiff, having failed on other grounds, claimed a prescriptive crossing. Of this the Court says:

“And a review of all the legislation upon the subject of railroad crossings in this state from 1878 to the present time clearly shows a progressive tendency of legislative opinion in harmony with the judgment of this court as expressed *In re Railroad Commissioners*, 83 Maine 273, that public safety requires the intersection of railroad tracks and roads to be under the control of the railroad commissioners. It was further provided by chapter 282 of the Laws of 1889 that a way may be laid out across, over or under the railroad track, ‘except that before such way shall be constructed, the railroad commissioners shall determine whether the way shall be permitted to cross at grade or not, and the manner and condition of crossing’. Indeed, it has been the avowed policy of the state to place the entire subject matter under the jurisdiction and control of the railroad commissioners. To hold that a prescriptive right to cross a railroad track can be acquired by an adverse use during the existence of these statutes would be wholly incompatible with manifest spirit and purpose of this legislation, and contrary to the settled policy of the state.”

New York, New Haven, etc. Railroad Co. vs. New Haven, 70 Conn. 390: Suit to restrain defendant from constructing any highway crossing upon the roadbed of plaintiff. Defendant claimed that its charter giving the court of common council the sole and exclusive authority and control over all the streets and highways within the city, and au-

thority to lay out, etc., empowered the city to construct the crossing in question. The Court held that:

“The railroad commissioners, and not the municipal authorities, have sole original jurisdiction of questions relating to changes in highways at grade crossings, when the determination of such questions affects the safety of the public.
* * * The language of Section 31 of the city charter should not be interpreted literally. It must be construed with reference to these general laws; and the general laws concerning the control of highways at grade crossings, in so far as they conflict with the provisions of Section 31, must control.”

And held that the city's only remedy was by application to the railroad commissioners under 3499 of the General Statutes.

Missouri K. & T. R. Co. vs. Richardson (Oklahoma), 106 Pac. 1108: The Oklahoma constitution confers on the corporation commission in general terms the regulation of railroads, and the Court held the power to be broad enough to include the determination of the proper point for crossing of two railroads, and that to this extent it overrides Section 1022 of statutes providing for the adjustment of the point and the damages by commissioners.

State ex rel N. P. R. Co. vs. Railroad Commission, 140 Wis. 145: Held, that the statute creating a Railroad Commission and providing that every crossing of railroad tracks should be above, below

or at grade of the tracks, as the Commission should decide, gives the Commission power to determine the point of crossing, though the statute contains no express clause to that effect, and though Section 1828 of the General Statutes provided for appointment of commissioners by court to determine points and manner of crossings, or compensation in case of dispute.

Smith vs. Town of New Haven, 59 Conn. 203, 208: Under statute providing that "When a new highway, or a new portion of a highway, shall hereafter be constructed across a railroad, such highway or portion of highway shall pass over or under the railroad, as the railroad commissioners shall direct", it was held proper for the commissioners to pass on this question before the highway had been legally laid out—this over the objection that they had no jurisdiction to make an order in the matter prior to the laying out of the highway.

Cullen vs. N. Y. R. Co., 66 Conn. 211: Action to recover damages occasioned by closing of a certain highway in the City of New Haven, upon order of the railroad commissioners. Held, by Judge Baldwin, that the provisions of the charter of New Haven, giving its common council sole and exclusive authority over all streets and highways within the city, must be construed with the provisions of the General Statutes relating to the location and operation of railroads and powers of railroad commissioners in reference thereto. And "A steam railroad is a road in the safe maintenance and operation of which the whole state is directly interested. It is

therefore put under the supervision of a board of state officers, with extensive powers. Their authority sometimes trenches upon what would otherwise be within the exclusive jurisdiction of some particular municipality, and wherever it does the latter must give way, for so only could any general policy of administration be carried out. The proper regulation of railroads, in their course through different towns, is a matter which is necessarily of more than local concern. * * *

If any doubt whatever existed as to the right of the legislature to confer judicial powers upon the Railroad Commission, untrammelled by other provisions or limitations of the constitution except the one that such powers must be germane to the constitutional powers expressly conferred upon them, but of course subject to certain constitutional provisions designed to protect liberty and property, that doubt has been removed by the decision of our Supreme Court in *Pacific Telephone & Telegraph Co. vs. Eshleman*, 166 Cal. 640.

The question whether the Legislature had the right to confer legislative or judicial powers upon the Railroad Commission is entirely a state question. In *Consolidated Rendering Co. vs. Vermont*, 207 U. S. 541, the Supreme Court of the United States, at page 552, says that:

“There is no provision in the federal constitution which directly or impliedly prohibits a state, under its own laws, from conferring upon non-judicial bodies certain functions that may be called judicial.”

On the same principle, there is nothing in the Federal Constitution which prohibits a state from conferring legislative powers upon administrative bodies. Accordingly, in *Southern Pacific Co. vs. Campbell*, 230 U. S. 537, Mr. Justice Hughes, in delivering the opinion of the Court, concludes as follows:

“The criticism made in the bill, that the Railroad Commission act violated the state constitution in conferring upon the Commission authority to exercise legislative, executive and judicial powers, has been answered by the decision of the state court sustaining the statute. *State vs. Corvallis & E. R. Co.*, 59 Or. 450, 117 Pac. 980.”

See also in this connection, *O. R. & N. Co. vs. Campbell*, 173 Fed. 957, 978, in which case, after an exhaustive review of the authorities, the Court holds that there can be no valid objection to conferring legislative authority upon the Oregon Railroad Commission, and that the conferring of such authority does not violate the provisions of Section 1 of Art. III of the Constitution of Oregon, dividing the functions of government into three separate departments, executive, legislative and judicial, and providing that no person charged with official duties under one of these departments should be competent to exercise any functions of another, except as provided in the Constitution itself.

These questions were presented to the District Court of Appeal for the Second Appellate District

of the State of California in the case of *Southern Pacific Company vs. Superior Court of Kern County*, a certiorari proceeding to review a judgment of the Superior Court in a case which arose in the Justice's Court in Kern County. The case has not yet been printed in the official California Reports, but may be found at page 397 of Volume 150 of the Pacific Reporter. The District Court of Appeal, after a long discussion of the statutory provisions, held that if a charge in violation of the long and short haul clause was in conflict with the Constitution it was a charge beyond the jurisdiction of the Railroad Commission, because it was a charge that the Commission could not legalize after it was made and paid, however just the amount might seem to be, "conceding that it could legalize any subsequent charges", and that the jurisdiction to pass upon an alleged illegal charge of this kind was necessarily vested in the courts.

The lengthy discussion by the Court is apparently *obiter*, because the Court concludes by saying that it is not concerned with any error, or absence of error, that may inhere in the judgment of the Superior Court, because that judgment was not subject to appeal, having been rendered on appeal to the Superior Court from the Justice's Court. The Court then held that the Superior Court had jurisdiction to hear and determine the case, and declined to annul its judgment on a proceeding in certiorari.

A petition for transfer to the Supreme Court was filed by the petitioner, and the opinion of the Supreme Court in that respect may be found at page

404 of 150 Pacific Reporter. On the point that application to the Railroad Commission was necessary, the Supreme Court said:

“It would seem to be immaterial in this proceeding whether or not it is essential to the cause of action in the courts that prior proceedings should have been had before the Railroad Commission. If such prior proceedings are essential, the failure of the plaintiff to show such action simply goes to the making of a sufficient cause of action, a matter not reviewable in certiorari.

“Our denial of the application for a hearing in this court is not to be taken as an approval of the views of the District Court of Appeal as to the necessity of such action in any case. We say this much, not with the purpose of expressing any disagreement with those views, because we have not deemed it advisable to consider the same on this application, and prefer to leave that matter to be decided in some case where it is directly involved, rather than to grant a hearing in this court of a case correctly decided by a District Court of Appeal, for the mere purpose of considering matters not properly cognizable in such a proceeding as this.”

It will thus be seen that the question of the necessity of application to the Railroad Commission has not been foreclosed by any authoritative decision of the California Appellate Courts, and that the

Supreme Court itself is, to say the least, in considerable doubt as to whether such application was necessary.

VIII.

The Judgment of the District Court should be reversed.

We respectfully submit that the situation here presented is one which does not call for any strained or illiberal construction of the provisions of the California Constitution or the California statutes hereinbefore referred to.

In the case at bar the plaintiff in error, a railroad carrier, has during both of the periods above discussed, collected to the intermediate points in question the rates established and promulgated by the Railroad Commission, and rates which, under the penal provisions hereinbefore quoted, it was bound to observe or to suffer prosecution. As to the amounts collected before October 10, 1911, we offered to show that they were specifically fixed and established by the Commission, and as to the amounts collected after October 10, 1911, we offered to show that they were rates which the railroad was expressly authorized to charge by the series of orders offered in evidence and refused admission.

We think it familiar learning that a carrier is not called upon to assume the unconstitutionality of a law until such unconstitutionality has been definitely determined by a Court of competent jurisdiction. Plaintiff's whole case proceeds upon the theory

that, notwithstanding these rates had been fixed in the most formal manner by the Railroad Commission, the carrier should have obeyed the supposed mandate of the Constitution and charged the lesser rate, although by so doing it would have subjected itself to prosecution under the provisions of the acts above referred to, and we were blandly told by the defendant in error that in the event of such a prosecution we might have defended on the ground that the rates so established were illegal to the extent that they contravened the long and short haul provisions of the Constitution. The principle we here contend for is well expressed by the Supreme Court of Louisiana, in *Factors' & Traders' Insurance Co. vs. City of New Orleans*, 25 La. Ann. 454, 460 (33 Louisiana Reports, Annotated Edition, 314), in the opinion written by Justice Morgan on rehearing (33 La. 319):

“There is, in our opinion, another reason why the plaintiff should not recover, It is, that the law under which the tax was paid was in full force and vigor at the time the money was paid. It is contended that it never had any life because it was unconstitutional; that an unconstitutional law is no law, and therefore must be considered as never having been written. This is a fallacy. The rule of universal application is that all laws are presumed to be constitutional until the contrary is decided. Courts do not assume to themselves the prerogative of deciding on their own motion that a law under which rights are claimed or duties are imposed is

unconstitutional. To authorize them to do this the matter must be directly put at issue by the parties litigating before them. Rights can be acquired under a law which may be determined to have been unconstitutional, and pains and penalties be avoided by those who justify their acts as having been committed under a law, however that law may have been subsequently declared to have been unconstitutional.”

In *State vs. Carroll*, 38 Conn. 449, on page 473, the Court, after speaking of the principle of judicial construction, that before an Act of the Legislature be declared unconstitutional its repugnance to the provisions or implication of the Constitution should be manifest, says:

“It has never been claimed, to my knowledge, before that a citizen may adopt that judicial rule of construction and treat a law if manifestly unconstitutional as without the semblance or color of authority.”

We respectfully submit that the judgment should be reversed.

Respectfully submitted,

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No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a
corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COM-
PANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

In Error to the United States District Court for the Northern
District of California, Second Division.

HOEFLE, COOK, HARWOOD & MORRIS,

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Attorneys for Defendant in Error.

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STATEMENT OF THE CASE

The statement of the case appearing in the brief of plaintiff in error at pages 1 to 19, is generally correct with the following exceptions:

In quoting the provisions of the Constitution of California, which plaintiff in error states must be considered, no reference is made to Section 22 of Article I, reading as follows:

Sec. 22. *The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.*

The above quoted provision has formed a part of the Constitution of California ever since 1879.

At page 9, plaintiff in error states that it was claimed by defendant in error, and held by the District Court, that although the rates collected were "fixed" by the Commission, nevertheless the charges made in pursuance of rates so "fixed" were illegal. Defendant in error has never claimed that these rates were "fixed" by the Commission. The position of defendant in error has been that the Commission had no authority to fix rates which contravened the Constitutional provisions and that if it attempted to do so its action was void. The District Court (Tr. of Record, Vol. 2, p. 365) held:

"Before the Amendment the Commission was as powerless to fix rates in contravention of the prohibition as the carrier was to charge them; and if it assumed to do so, its act was simply void and not only cast no obligation upon the carrier to obey its order, but afforded no protection for such obedience."

Another somewhat incorrect statement is that "it was claimed by defendant in error and held by the District Court, that immediately on taking effect of the constitutional amendment of October 10, 1911, all rates violative of the long and short haul clause contained in Section 21 of Article XII as then amended, *no matter what might have been their previous status, immediately became illegal* to the extent that the greater charge for the shorter distance exceeded the lesser charge for the longer distance." The position of defendant in error was not that these rates "became illegal" upon the amendment to the constitution, but that they were illegal at the time of such

amendment, and that the purpose of the amendment was to legalize thereafter rates violative of the long and short haul prohibition whereupon application of the carrier and after investigation the Commission granted relief from the prohibition. The District Court said, (Record p. 394) :

“All we are concerned with here, Mr. Booth, under the issues in this case, is any instances in which the Railroad Commission upon application has made an order authorizing suspension, that is authorizing a deviation from the provisions of the constitution in question. That power was given them by the amendment of October 10, 1911. Any instance where they did not authorize it, it was just as obligatory upon the carrier as it was before.”

Incidentally the defendant in error also maintained that even if such rates had been legal prior to October 10, 1911, the amendment to the Constitution of that date would have rendered them illegal until relief was granted by the Commission.

The statement that the answer of defendant “denied the material allegations of the complaint” is also erroneous, as all of the material allegations of the complaint were admitted by the answer.

The first 85 causes of action accrued under Section 21 of Article XII of the Constitution as it existed prior to the amendment of October 10, 1911. The material part of the section was as follows:

“Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any sta-

tion landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing."

The causes of action number 86 to 120, both numbers inclusive, accrued under Section 21 of Article XII as amended October 10, 1911. The material portion of the section as amended is as follows:

"It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation, as a through rate than the aggregate of the intermediate rates. Provided however, that upon application to the Railroad Commission provided for in this constitution, such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

Judgment was rendered in favor of plaintiff as prayed for in its complaint.

In its brief plaintiff in error contends that the judgment of the District Court should be reversed for the following alleged reasons:

1. That Section 21 of Article XII of the Constitution of 1879, as it existed prior to October 10, 1911, is invalid because in terms it attempts to regulate interstate commerce, and that such alleged attempt is so intermingled with its other provisions that it will not be presumed that the people would have adopted the Section if the invalidity of the portion attempting to regulate interstate commerce had been known.

2. That the long and short haul provisions of the Constitution violate the Fifth and Fourteenth Amendments to the Federal Constitution.

3. That defendant in error has no right to action to recover the excessive charge either at common law or under a statutory provision.

4. That defendant in error had no cause of action to recover the illegal charges because no formal protest was made at the time of their payment.

5. That, as to the causes of action accruing after the amendment of October 10, 1911, the Commission made a series of orders "with the intention of preserving the status of the rates then being charged by plaintiff in error until it could be determined whether, and, if so to what extent, it was entitled to relief." This contention is coupled with the further contention that the charges collected were those in existence on October 10, 1911, and that they were legally established by the Commission prior to that date.

6. That the motion for a nonsuit should have been granted as to the causes of action accruing after October 10, 1911, because the defendant in

error (plaintiff below) did not offer evidence that the plaintiff in error had not been relieved from the prohibition to charge less for the longer than for the shorter haul.

7. That the complaint is defective because it is not alleged therein that plaintiff or its assignors obtained a reparation order from the Railroad Commission.

In the brief of defendant in error we shall reply to these contentions of plaintiff in error *seriatim* and under the following heads:

1. That the long and short haul provision of the Constitution of 1879 does not in terms attempt to regulate interstate commerce, and even if it were susceptible of such construction, it could not be said that the people would not have prohibited the charging of more for the short than for the longer haul within California had they known that they could not enforce such a prohibition in the case of interstate commerce.

2. The long and short haul clause of the Constitution of 1879 and the long and short haul clause of the Constitution as amended October 10, 1911, do not violate the Federal Constitution.

3. A person who is required to pay more than the legal charge for the transportation of freight has a common law right to recover the overcharge and in addition to such common law right, has the statutory right conferred by the statutes of 1909, 1911 and the Public Utilities Act.

4. That it is wholly immaterial whether formal protest was made at the time of the payment of the illegal charges.

5. That the evidence sought to be introduced by plaintiff in error fails to show that the Railroad Commission

relieved plaintiff in error from the provisions of Section 21 of Article XII of the Constitution against charging less for the longer than for the shorter haul.

6. The Railroad Commission had no power to establish rates contravening the constitutional provision, and if it assumed to do so its act was void.

7. That it was not incumbent upon the plaintiff below to prove that the Commission had not relieved plaintiff in error from the prohibition of the Constitution, because if such relief had been granted, it was a matter of defense which the law requires the defendant to plead and prove.

8. No reparation order of the Railroad Commission was necessary in order to entitle the plaintiff, or its assignors, to maintain an action in the courts.

1. THAT THE LONG AND SHORT HAUL PROVISION OF THE CONSTITUTION OF 1879 DOES NOT IN TERMS ATTEMPT TO REGULATE INTERSTATE COMMERCE, AND EVEN IF IT WERE SUSCEPTIBLE OF SUCH CONSTRUCTION, IT COULD NOT BE SAID THAT THE PEOPLE WOULD NOT HAVE PROHIBITED THE CHARGING OF MORE FOR THE SHORT THAN FOR THE LONGER HAUL WITHIN CALIFORNIA HAD THEY KNOWN THAT THEY COULD NOT ENFORCE SUCH A PROHIBITION IN THE CASE OF INTERSTATE COMMERCE.

The long and short haul provision of the Constitution of 1879 was contained in Section 21 of Article XII, which reads as follows:

Section 21:

“No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. *Persons and property transported over any railroad, or by other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing.* Excursion and commutation tickets may be issued at special rates.”

Plaintiff in error states that the above quoted section “expressly endeavors to regulate rates charged by California carriers, no matter whether such rates relate to interstate or intrastate movements.”

Plaintiff in error further states:

“The section therefore is one prohibiting discrimination, and it seems perfectly clear that the framer of the section had in mind the protection of places and persons in California against discrimination by a railroad, no matter whether such discrimination consisted in the application of interstate rates or in the application of intrastate rates, or a combination of both.”

There are two complete answers to this contention. The first is *that the long and short haul provision makes no reference to interstate commerce, and the second is that even if it could be otherwise construed, it will be presumed that the people intended to make discrimination (charging more for the short haul is a specific kind of discrimination) unlawful in intrastate commerce whether or not the prohibition against discrimination could apply to interstate commerce.*

The first sentence of Section 21 of Article XII prohibits discrimination in charges or facilities “between places or persons * * * within this state, or coming from or going to any other state.”

The second sentence which contains the long and short haul prohibition does not make any reference to places outside of the State, or to interstate transportation. It contains the law of California with reference to such charges. The people of California were instituting an organic law to regulate the transportation of persons and property within the State. As to such transportation their power was supreme and the language used was unobjectionable. It was wholly unnecessary for them to qualify the clause with a provision that the transportation should begin

and end within the state as such was its legal effect in the absence of such qualification.

The second sentence containing the long and short haul clause does not depend upon the first sentence of the Section. The second sentence contains a complete provision in itself. No reference need be made to the first sentence in determining the meaning of the second. The abrogation of the first sentence would not repeal or in any manner impair the provisions of the long and short haul clause contained in the second sentence. It is true that the charging of more for the short than for the long haul is a species of discrimination. Yet the people saw fit to segregate that particular kind of discrimination and to enact a prohibition against it in definite terms. In no sense can it be said that the long and short haul prohibition is an inseparable part of the provision contained in the first sentence. The fact that it is not a part thereof at all but a separate and independent enactment.

Counsel for plaintiff in error state:

“It may be claimed by defendant in error that Section 21 of Article XII of the California Constitution is separable as respects the three sentences constituting the section, and that even though the first sentence be vulnerable to attack on the ground that it is a palpable effort to regulate interstate commerce, the second sentence is not subject to the same objection * * * We think the Section should be considered as an entirety, as an effort to forbid discrimination, but if it be susceptible of division into sentences, the vice remains in the second sentence.”

Counsel then quote the long and short haul provision, italicizing the words “any station” and “any

more distant station''. It is then argued that the provision applies in terms to transportation, for instance, from Oakland to Sacramento in the event a lower rate was charged for a similar shipment from Oakland to Reno, Nevada—this because Reno is a “more distant station.”

It must be apparent, however, that this contention will not bear analysis. The “vice” of which counsel complain could only be removed by *an express proviso that all stations, viz. the short or long haul points should be within the State.*

Surely it cannot be maintained that a State, in legislating upon matters within its competence, is under the necessity of adding to the statute a declaration that the statute shall not be construed to affect matters without its territorial limits and over which it has no authority to legislate.

It will not be presumed that the people intended that the Constitution should be construed so as to render it subject to the objection that it undertook to regulate interstate commerce. On the contrary the well known rule will be applied that constitutional and statutory provisions which are attacked on the ground of alleged unconstitutionality will be construed so as to uphold their validity even in doubtful cases.

This, however, is not in any sense a doubtful case. The terms of the long and short haul provisions of Section 21 can be given full force and effect by limiting their application to intrastate commerce. The idea that a California rate might, under this provision, be based on an interstate rate to Reno would certainly never occur to any person who had a proper

conception of the power of the state over its intra-state commerce.

This case involves intrastate shipments only. The points of shipment, points of delivery and the more distant point to which the lower rate was charged are all within the State of California. As a defense to this action, the far-fetched argument is made that the Constitutional provision is invalid because its terms are broad enough to support the admittedly unsound contention that the rates for the transportation of goods to a point within California should not be higher than the interstate rate to a "more distant" point out of the State.

It cannot be that a statute or constitutional provision of a state which can be given full force within the State will be held invalid because if applied to extra-state matters it would contravene the Federal Constitution. Such a construction would do violence to the fundamental rule that the provisions of a state constitution are presumably valid and that every presumption is in favor of their constitutionality.

If there were any merit in this contention it could be made with equal force against the validity of the long and short haul provisions of Section 21 of Article XII as they now exist. The Section as it now stands provides that it shall be unlawful "to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance." Reno is a "longer distance" from Oakland than Sacramento is from Oakland and it is over the same line and in the same direction. The meaning of the exist-

ing Section, therefore, is subject to be distorted in precisely the same manner as plaintiff in error seeks to distort the meaning of the former Section.

The case of *Wabash, etc., Co. v. Illinois*, 118 U. S. 557, cited by plaintiff in error is directly against its contention. In that case, as is stated at page 40 of the brief of plaintiff in error, a statute of Illinois provided that if a carrier charged for transportation "for any distance within the State" the same or a greater amount than at the same time was charged for the transportation in the same direction of the same class of property "over a greater distance of the same road" such charge should be *prima facie* evidence of unjust discrimination. In construing the statute the Supreme Court of Illinois held that a charge for a haul within the State which exceeded the charge for a haul to a point which was beyond the State line rendered the carrier guilty of unjust discrimination under the Act. (*People v. Wabash, etc., Co.*, 104 Ill. 476.) The case went to the United States Supreme Court on writ of error and that Court held that it was bound by the construction placed upon the Act by the Supreme Court of Illinois. Being so bound, the Supreme Court was constrained to hold that the section of the Act in question was unconstitutional insofar as it attempted to regulate interstate commerce. In rendering its decision, however, the Supreme Court clearly intimated that if the matter were before that Court for decision it would not have construed the Statute to apply to interstate commerce. The Court said:

"It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class

of transportation than that which begins and ends within the limits of the State.”

The Supreme Court further said:

“Of the justice and propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this Court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question.”

Counsel for plaintiff in error state that the result of the decision of the Supreme Court in *Wabash, etc., Co. v. Illinois, supra*, was that “the whole section fell to the ground.” Of course no such result followed from the decision of the Court. All that the Supreme Court held was that the plaintiff in error in that case had not violated any constitutional law of Illinois. Nothing in that decision impaired the validity of the statutory provision as applied to transportation beginning and ending in the State of Illinois. Nor did the decision of the Illinois Supreme Court reversed by the United States Supreme Court hold that the statute, as applied to transportation beginning and ending within the State, was not enforceable. That question was not involved in the case. There was nothing in the decision of the United States Supreme Court which would have prevented the Illinois Court in a future case involving intrastate transportation from holding that the statute was valid and enforceable as to such transportation. Not only is this so, but the decision of the United States Supreme Court would have directly supported such a decision.

The second answer to the contention that the long and short haul provisions of the Constitution of 1879

in terms attempts to regulate interstate commerce is that *even if the provisions had in terms applied to both intrastate and interstate commerce, it would be presumed that the people intended to enact the provision insofar as it applied to intrastate commerce even if they had known that it could not constitutionally apply to interstate commerce.*

As we have seen the contention here is based mainly upon the words "or coming from or going to any other state" at the end of the first sentence of Section 21. The first sentence of Section 21 contains the general prohibition against discrimination in charges or facilities. The prohibition of the first sentence of Section 21 is against discrimination in charges or facilities for transportation "within this state" and "coming from or going to any other state."

The contention of plaintiff in error is that the people would not have prohibited discrimination in California if they knew that they could not validly prohibit it as to interstate shipments coming to or going from California. The mere statement of this proposition would seem to refute it.

The people realized the evils of discrimination and desired to prevent them in every possible way. They enacted a prohibition against discrimination in intrastate transportation and coupled to this prohibition a prohibition against discrimination in interstate transportation. What possible basis is there in reason for the argument that they would not have prevented the evils of discrimination in California had they known that they could not prevent them elsewhere?

The authorities cited by plaintiff in error in support of this contention furnish the strongest argu-

ment against its unsoundness. In the case of *Sargent v. Rutland Railroad Company*, 85 Atl. 654 (Vt.) the statute provided that "no railroad doing business in the state" should charge, collect or receive "any demurrage charge on freight received at any station in this state" until four days after notification to the consignee; and another section of the statute provided that no railroad doing business in the State should charge any demurrage on any car "placed or held for loading in this state" until four days after notification to the consignor.

The Vermont Statute applied to a very different matter than the matter of rates for the transportation of freight or passengers or to the matter of the prohibition of discrimination. It related to the right of the railroads to charge demurrage on freight cars held by a consignee for the purpose of unloading. The Vermont court pointed out that a partly loaded car coming into the State might have local freight loaded into it and that under the Act (applying it only to local shipments) demurrage could not be charged unless the consignee who received the local freight took over four days to unload his freight, whereas the shipper whose freight came from without the State was obliged to pay demurrage at the rate of \$1.00 per day in pursuance of the regulations of the Interstate Commerce Commission. The Court said:

"The effect of these provisions seems to be such, among other things, that when a foreign car comes into this state loaded with freight of a nature to be taken from the car by the consignee, destined in part for each of two points in the state, domestic freight of like nature between such places, going in the same direction,

may be carried at the same time in the same car; and in returning the car to the home road it may be engaged at the same time in carrying freight of the same nature in part destined for some points within the state and in part for some point beyond the state. Thus such cars may concurrently be instruments of state and of interstate commerce, and this seems likely to be of such frequent occurrence in the practical operations under the car service rules, as to render it proper of notice in determining the questions before us; for the constitutionality of a law is to be tested, not by what has been done under it, but by what may rightfully, by its authority, be done."

The court reached the conclusion that the statute could not be applied to local traffic without in many instances directly affecting interstate traffic. It therefore held that the legislature must have intended when it enacted the statute that it should apply to both intrastate and interstate commerce. As already pointed out such a statutory provision could not without great difficulty be applied to local traffic alone; and the language of the act being all inclusive, the court adopted the view that the legislature might not have enacted the statute at all if they had known that it would apply to cars containing local shipments only. The matter of freight rates for transportation or the matter of discrimination are entirely different matters. There is no possibility of an interstate freight movement being confused with an intrastate freight movement. Each movement is a distinct and separate transaction. Even if a state act in terms applied to interstate shipments, the portion thereof so applying, would, under well established rules of construction, be held invalid without impairing the validity of the portion applying to intrastate shipments.

The *Employers' Liability Cases*, 207 U. S. 463, do not support the contention of plaintiff in error that the people of California would not have declared discrimination unlawful in California had they known they could not exact a valid prohibition against it in interstate commerce. The Act of Congress in question applied in terms to all carriers engaged in interstate commerce and imposed a liability upon them in favor of all their employees without restriction as to the business in which the carriers or their employees might have been engaged at the time of the injury. In replying to the contention that the words "any employee" found in the statute should be held to mean any employee when such employee was engaged in interstate commerce the Supreme Court said that the provisions were *indivisible* and further said that even if they had been divisible the rule contended for would only apply where it was plain that Congress would have enacted the provision with the unconstitutional provision eliminated.

The difference between the statute under consideration in the *Employees' Liability Cases* and the first sentence of Section 21 is that the provisions of the Act of Congress were indivisible whereas the provisions of the first sentence of Section 21 are divisible. *The main difference, however, is that from the very nature of the subject matter of Section 21 it is clear that the people would have forbidden discrimination in California even if they knew they could not prohibit it in interstate commerce.*

The provisions of the first sentence of Section 21 are in no material respect different from a statute providing that all carriers in the State should publish and file schedules showing their rates for intra-

state movements and also for all interstate movements originating or ending in the State, and that no rate in excess of those published should be charged. The part of the statute applying to interstate shipments would be void, but there would be no force in the contention that the legislature did not intend that this salutary and general provision of the statute should be enforced at all unless that part of it applying to interstate commerce could be enforced.

The contention that the long and short haul provision of the Constitution of 1879 "in terms attempts to regulate interstate commerce" was not made in the District Court although the case was elaborately argued and briefed in that court. In fact the brief filed by plaintiff in error in that Court was more voluminous than the brief filed in this Court. This contention is the result of an afterthought. Nevertheless this contention is given first consideration here. Possibly if the contention had been made in the Court below and counsel had had an opportunity to consider the arguments against it, the contention might have been accorded a somewhat less prominent place in the brief of plaintiff in error.

2. THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION OF 1879 AND THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION AS AMENDED OCTOBER 10, 1911, DO NOT VIOLATE THE FEDERAL CONSTITUTION.

As stated by the learned Judge of the District Court, the Supreme Court of the United States in the case of *Louisville & Nashville Railway Co. v. Kentucky*, 183 U. S. 503, and in the *Intermountain Cases* (U. S. v. A. T. & S. F. Ry. Co.) 234 U. S. 476, has held that an absolute prohibition against charging more for the short than for the long haul does not violate the Federal Constitution.

The Supreme Court of the United States in the case of *Louisville & Nashville Ry. Co., v. Kentucky*, 183 U. S. 503, held constitutional the long and short haul clause of the Kentucky Constitution, overruling the objections that it deprived the carrier of its property without due process of law and deprived it of the equal protection of the laws.

The clause in the Kentucky Constitution was substantially similar to Section 4 of the Interstate Commerce Act as it existed prior to the amendment of 1910. It contained the clause "under substantially similar circumstances and conditions." *However, the highest court of Kentucky held that this clause did not render the prohibition inapplicable where there was competition at the long haul point, thereby adopting a construction diametrically opposed to the construction placed upon Section 4 of the Interstate Commerce Act by the United States Supreme Court.* When this case came before the Supreme Court that Court considered the constitutionality of the provision of the Kentucky Constitution in view

of the construction placed upon it by the highest court of Kentucky. By this construction the clause quoted above was for all practical purposes eliminated. Referring to the constitutionality of the long and short haul clause the Supreme Court said:

“To sustain these contentions the learned counsel for the plaintiff in error cite and rely upon those decisions of this court in which it has been held that, under pretense of regulating fares and freights, a State cannot require a railroad corporation to carry persons or property without reward, neither can it do that which in law amounts to the taking of private property for public use without just compensation or without due process of law; that the question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the reasonableness both as regards the company, and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination; and that if the Company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and that in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*, 134 U. S. 418; *Regan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *Smyth v. Ames*, 69 U. S. 466; *Lake Shore & Michigan Southern Railway Co., v. Smith*, 173 U. S. 684.

“We certainly have no disposition to overrule or disregard cases so recently decided and so elaborately considered. And accordingly, if it appeared, in the present case, that the railroad commission had arbitrarily fixed rates of fare and freight, in respect to which the railroad company was given no opportunity to be heard, and which were confiscatory, and amounted to depriving the plaintiff in error of its property without due process of law, it would doubtless be our duty to furnish the relief asked for. *Nor, yet, are we ready to carry the doctrine of the cited cases beyond the limits therein established. For the Federal courts to interfere with the legislative department of the State government, when acting within the scope of its admitted powers, is always the exercise of a delicate power, one that should not be resorted to unless the reason for doing so is clear and unmistakable.*”

Further the Court said:

“*It is scarcely necessary to say that courts do not sit in judgment on the wisdom of legislative or constitutional enactments.* This is a general principle; but it is especially true of Federal courts when they are asked to interpose in a controversy between a State and its citizens. This court then is not concerned with the wisdom of the people of Kentucky when they declared in their Constitution that it should be unlawful for any person or corporation owning or operating a railroad in that State, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance. Nor, as we have already seen, is it for us to say that the Court of Appeals

of Kentucky erred in so construing that enactment as to forbid a railroad company from justifying a voluntary disregard of its command by claiming that competition between its road and other modes of transportation created substantially dissimilar circumstances and conditions.

“It does not call for argument that railroad companies are incorporated to perform a public service, and that it is for the State to define their powers and control their exercise of such powers. The question for us, in the present case, is whether the State by enacting a rule of action for such companies, forbidding a greater rate of charges for a shorter than for a longer distance, and by establishing a railroad commission of the kind and with the functions disclosed in the Constitution and statutes, *deprives the plaintiff in error of its property without due process of law and denies to it the equal protection of the laws.*

“When the citizens of Kentucky voluntarily seek and obtain a grant from the State of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds and operates its road subject to the constitutional inhibition we are considering, and are without power to challenge its validity. It may be that, in a given case, a railroad company may be able to show that the State has disabled itself from enforcing the provision by a contract previously made, and it may be that cases may arise in which the provision cannot be enforced because operating as an unlawful interference with commerce between the States. Indeed, those very positions are taken by the plaintiff in error in this case, and will receive our attention hereafter. *But, apart from such contentions, and looking only at the case of a company voluntarily formed to carry*

on business wholly within a State, we are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the State.

“It is said that, while it is true that railroad companies receive their rights to exist and to maintain their roads from the State, yet that their ownership of such roads is property, and, as such is protected from arbitrary interference by the State. But, though it be conceded that ownership in a railroad is property, it is property of a kind that is subject to the regulations prescribed by the State. We do not wish to be understood as intimating that if, hereafter, the railroad commission should fix and establish rates of a confiscatory character the company would be without protection which courts of equity have heretofore given in cases of that description. *What we now say is, that a State corporation voluntarily formed cannot exempt itself from the control reserved to itself by the State by its Constitution, and that the plaintiff in error, if not protected by a valid contract, cannot successfully invoke the interposition of the Federal Courts, in respect to the long and short haul clause in the State Constitution, on the ground simply that the railroad is property. Nor is there any foundation for the objection that the provision in question denies to the plaintiff in error the equal protection of the laws. The evil sought to be prevented was the use of public highways in such a manner as to prefer, by difference of rates, one locality to another, and the remedy adopted by the State was to declare such preferences illegal, and to prohibit any person, corporation or common carrier from resorting to them. That remedy included in its scope every one, without distinction, whose calling, public in its character, gave an opportunity to do the mischief which the State desired*

to prevent. The practical inefficiency of this remedy to reach the desired end, and the resulting injury to the welfare of both the producers and the consumers of an article like coal, when brought into competition with coal brought from without the State, are strongly urged on behalf of the plaintiff in error; but, however well founded such objections may be, they go to the wisdom and policy of the enactment, not to its validity in a Federal point of view. The people of Kentucky, if it can be shown that their laws are defective in their conception or operation, have the remedy in their own hands.

“It is further contended that the indictment and proceedings in this case were void, because of the nature of the proviso in section 218 of the Constitution. That proviso is in the following words: ‘Provided, that upon application to the railroad commission, such common carrier, or person, or corporation, owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances, for the transportation of passengers or property; and the commission may from time to time, prescribe the extent to which such common carrier, or person, or corporation owning or operating a railroad in this State, may be relieved from the operation of this section.’

“The argument is that ‘even if it were proper to prohibit absolutely the charging of more for short than long hauls, yet where the law does not do so, but recognizes that there may be legitimate traffic which could thereby be interfered with, it is unconstitutional to entrust the dispensation of the right to engage in such legitimate traffic to a mere administrative tribunal, without any rules by which it may be guided, without specifying any conditions upon which the car-

riers shall be entitled to enjoy such legitimate traffic, and absolutely free to give or withhold its consent at its own pleasure or will in any and all cases, without judicial review of control.'

"But if it be competent for the State, as this argument supposes to wholly forbid, in every case and by every carrier, the charging of more for a short than a long haul, it is not easy to see why the State may not permit such charges through the action of a tribunal authorized to investigate the subject and to afford relief in cases deemed proper. Such a provision is *ex gratia*, and in the direction of exonerating the carrier from what the argument concedes to be a lawful limitation."

As construed by the Kentucky courts the provision of the Kentucky Constitution was substantially the same as the provision of Section 21 of Article XII of our Constitution as amended October 10th, 1911. It was an absolute prohibition against charging more for the short than for the long haul with the proviso that the Commission could in special cases after investigation relieve from the operation of the prohibition. Therefore the decision of the United States Supreme Court is direct authority to the effect that the long and short haul clause of our Constitution as amended October 10th, 1911, does not violate the 14th Amendment; and by analogy it is authority to the effect that the inflexible long and short haul clause of the Constitution of 1879 is constitutional. Every argument contained in the opinion in Louisville & Nashville v. Kentucky, supra, that the clause of the Kentucky Constitution did not violate the Federal Constitution is equally applicable to the inflexible long and short haul clause of the Constitution of 1879.

The clause of the Kentucky Constitution under consideration in *Louisville & Nashville Ry. Co. v. Kentucky*, *supra*, was substantially similar to Section 4 of the Interstate Commerce Act as it existed before the amendment of 1910. It contained the clause "under substantially similar conditions and circumstances," but the highest court of Kentucky had held that the circumstances were not dissimilar *merely because there was competition at the long haul point and that the prohibition applied notwithstanding such competition*. Therefore, as said by the Supreme Court, the constitutional provision of Kentucky amounted to an absolute prohibition with an *ex gratia* relieving clause.} As construed by the Kentucky courts the clause of the Kentucky Constitution was for all practical purposes identical with the present Section 4 of the Interstate Commerce Act and with Section 21 of our Constitution as amended October 10th, 1911. It follows therefore that the decision of the Supreme Court *is direct authority to the effect that Section 21 as amended October 10th, 1911, does not violate the Fourteenth Amendment*. It is clear that every reason stated by the Supreme Court in the Louisville & Nashville case in support of the constitutionality of the clause of the Kentucky Constitution applies with equal force to the inflexible long and short haul clause of the Constitution of 1879. *If a prohibition with an ex gratia relieving clause does not deprive the carrier of its property without due process of law it follows conclusively that a prohibition without such relieving clause does not do so.*

In *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 564, the Supreme Court with reference to the inflex-

ible long and short haul clause of the Illinois Statute of 1871 said:

“If the Illinois statutes could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected with a continuous transportation through or into other States, there does not seem to be any difficulty in holding it valid.”

Further the Court said (pg. 577):

“Of the justice and propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this Court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question.”

The power of the State over all persons within its jurisdiction is plenary, and in innumerable ways it may regulate the actions of such persons and restrict their freedom of contract. An inflexible long and short haul clause viewed from the Constitutional standpoint is no different from hundreds of other enactments restricting freedom of contract which have been sustained by the courts.

It is said that it prevents the carrier from carrying to the long haul point, because owing to competition at such point, unless it lowers its charge to that point below what is a reasonable rate to the short haul point it cannot obtain business. This may be freely granted but nevertheless the Constitutional rights of the carrier are not invaded. *The State has the undoubted right to prohibit a common carrier from engaging in that sort of competition. It has the undoubted right to forbid a common carrier to trans-*

port property for less than a reasonable rate. But by the inflexible long and short haul clause the State has not gone to this extent. In effect it has merely enacted that the charge to the long haul point shall not be below a reasonable rate to such an extent as to make an equal charge to a less distant point non-remunerative. It could have gone much further without invading any Constitutional right of the carrier.

A carrier has a constitutional right to a reasonable compensation for its services but it has no constitutional right to carry goods for less than a reasonable compensation. The State has the right to fix minimum as well as maximum charges and although a carrier can attack the maximum rate on the ground that it is so low as to be confiscatory, yet it has no constitutional ground of attack upon the minimum rate.

In *Bluefield v. N. W. Ry. Co.*, 22 I. C. C. 536, the Commission said with reference to the long and short haul clause of the Interstate Commerce Act:

“The purpose of Congress seems to have been to keep alive competition at competitive points upon the theory probably that while injustice might in some instances result the general effect might be for the public good.”

On the other hand it would appear that the policy of this State was in some cases to *restrict competition at competitive points upon the theory that while injustice might result in some cases the general effect would be beneficial*. Upon analysis the whole matter resolves itself into one of public policy.

The flat mileage rate held non-violative of the 14th Amendment by the United States Supreme Court in

the Minnesota Rate Cases (230 U. S. 352) is subject to every objection that can be made to an inflexible long and short haul clause.

The history of the 4th section of the Interstate Commerce Act shows that from the time the Act was first proposed in 1886 there were many members of Congress who favored an inflexible long and short haul clause. The Act to Regulate Commerce was first introduced in the Senate. When it went to the House Section 4 contained a flexible long and short haul clause. On July 30th, 1886, the House passed a substitute bill which amended Section 4 of the Senate bill so as to read as follows:

“That it shall be unlawful for any person or persons engaged in the transportation of property, as provided in the first section of this Act to charge or receive any greater compensation for a similar amount and kind of property, for carrying, receiving, storing, forwarding, or hauling the same, for a shorter than for a longer distance, which includes the shorter distance on any one railroad; and the road of a corporation shall include all the road in use by such corporation, whether owned or operated by it under a contract, agreement, or leased by such corporation.”

Re Southern Ry. & Steamship Assn., I. C. C.
287.

A conference committee was appointed and at the second session of Congress the committee agreed upon Section 4 in the form in which it was originally enacted in 1887. It will be noted that the bill as passed by the house contained an absolute prohibition against charging more for the short than for the long haul.

In the case of *Re Application of S. P. Co. for relief under the provisions of the fourth section, 22 I. C. C. 366, 374*, the Commissioners said:

“If it is injurious to the interstate commerce of this country, and inimical to the public welfare, to permit its railroad highways to be used so as to unduly promote the growth and prosperity of one city as against another, by charging more to the nearer point, *it is within the proper sphere of Congress to prohibit absolutely and completely the pursuance of such policy by the railroads.* Congress, however, has not seen fit to do this. Out of consideration for the claims of the carriers, and out of respect for those policies under which our commerce has grown, Congress has permitted exceptions to be made to its general policy, when justification is shown therefor. It is not conceivable, however, that in the application of this government policy the carriers may be permitted to disregard any of the prohibitions of the law. It would seem, therefore, fundamental in the enforcement of the fourth section that a carrier shall make proof, not only of water competition, as in this case, but of the reasonableness of the rates applied to intermediate points.”

Plaintiff in error complains that the long and short haul clause of the Constitution of 1879 “forces the adoption of a low competitive rate to a point where there is no competition, without a hearing or other adjudication of the reasonableness of the latter rate.”

But the Constitution does not force the adoption of such low competitive rate to a point where there is no competition. The carrier is not forced to make the low rate to the more distant point. It is against the policy of the law to permit a carrier to charge an unreasonably low rate to a long haul point, for if this

is permitted there will always exist the temptation to make up for the loss thus incurred by charging an unreasonably high rate to other points where competition does not exist.

Plaintiff in error states that the Constitution affords no "hearing or other adjudication of the reasonableness" of the rate to the short haul point. As pointed out *supra*, the effect of our constitutional provision is to prevent a charge to the long haul point which is so low that an equal charge to a shorter distance will not afford a reasonable return upon the investment of the carrier. The provision is a declaration of the policy of the State with reference to carriers and is applicable to all alike. It does not purport or attempt to fix rates nor does it compel the adoption of any rate by the carrier. The long and short haul clause is a law regulating carriers, and is in principle identical with hundreds of other enactments regulating persons and occupations, which have been upheld as non-violative of the Federal Constitution.

Provisions similar to the long and short haul prohibition of 1879 are contained in the Constitutions of Idaho, Missouri, Montana, and Washington. The Constitutions of all of these States contain absolute prohibitions against charging more for the short than for the longer haul. The provision of our Constitution was adopted from a Pennsylvania statute which contained an absolute prohibition against charging more for transportation from Pittsburg to points between Pittsburg and Philadelphia than was charged from Pittsburg to Philadelphia.

In the *Intermountain Cases* (U. S. v. A. T. & S. F. Ry. Co., 232 U. S. 476) *supra*, decided on June 22nd,

1914, while the demurrer to the defendant's answer in this case was pending, the Supreme Court declined to depart from its decision in *Louisville & Nashville Ry. Co. v. Kentucky*, 183 U. S. 503, *supra*, holding long and short haul legislation constitutional. The Court said:

"It is said in the argument on behalf of one of the carriers that as in substance and effect the duty is imposed upon the Commission in a proper case to refuse an application, therefore the law is void, *because in such a contingency the statute would amount to an imperative enforcement of the long and short haul clause and would be repugnant to the Constitution. It is conceded in the argument that it has been directly decided by this court that a general enforcement of the long and short haul clause would not be repugnant to the Constitution (Louisville & N.R.R.Co. vs. Kentucky, 183 U. S. 503) but we are asked to reconsider and overrule the case and thus correct the error which was manifested in deciding it. But we are not in the remotest degree inclined to enter into this inquiry, not only because of the reasons which were stated in the case itself, but also because of those already expounded in this opinion and for an additional reason, which is that the contention by necessary implication assails the numerous cases which form the enactment of the Act to regulate commerce down to the present time have involved the adequacy of the conditions advanced by carriers for justifying their departure from the long and short haul clause. We say this because the controversies which the many cases referred to considered and decided by a necessary postulate involved an assertion of the validity of the legislative power to apply and enforce the long and short haul clause. How can it be otherwise, since if this were not the case all the issues presented in the numerous*

cases, would have been merely but moot, affording, therefore, no basis for judicial action since they would have had back of them no sanction of lawful power whatever."

After quoting from the decision of the Supreme Court in *Norfolk & Western v. West Virginia*, 236 U. S. 605, to the effect that the State may not select a commodity, and instead of fixing what may be deemed a reasonable compensation for its carriage, compel the carrier to transport it either at less than cost or for a compensation that is merely nominal, plaintiff in error makes the following statement:

"This is precisely what the effect of the old Section 21, Article XII would be if it were given the inflexible operation contended for by defendant in error."

It is further stated:

"In the first case—that of the old section—there is no process of law at all. The Constitution, according to defendant in error, used the through rate as a yard stick, no matter whether it might be reasonable or unreasonable at the intermediate point."

The above quoted statements are so palpably erroneous that at first we hesitated to make any reply to them. As already pointed out, the plaintiff in error was under no obligation to fix a rate to the more distant point which would be less than remunerative to the intermediate points. The policy of the law, as declared by the Constitution, was against a carrier attempting to meet rates at the more distant point where such attempt would result in the rates being so low as not to afford reasonable compensation for

less distant hauls. We are not concerned with the reasons that dictated this policy. In all probability the people deemed that the carriage of goods to the more distant point at cost or at less than a reasonable compensation for the service was likely to result in the carrier's making up the loss of profit thereby incurred by charging an unreasonably high rate to other points. The constitutional provision did not "compel" the plaintiff in error to transport to any point "either at less than cost or for a compensation that is merely nominal" and the decision in *Norfolk & Western v. West Virginia*, 236 U. S. 605, *supra*, can have no application. Where the plaintiff in error charged the less rate for the longer distance it did so voluntarily and with the knowledge that by so doing it fixed that rate as the maximum which it could lawfully charge to intermediate points.

It is said that under the old Section 21 "there was no process of law at all." It is respectfully submitted that plaintiff in error has a most unique conception of the meaning of the term due process of law.

The people enacted a prohibition equally binding on every one to the effect that carriers should not charge more for a shorter than for a longer distance over the same line in the same direction. The prohibition was in pursuance of the police power of the state, and applied equally to every person engaged in the occupation of a common carrier. Seemingly it is the contention of plaintiff in error that a carrier is entitled to its "day in court" before it was bound by the prohibition.

Referring to the statement in the opinion of the District Court to the effect that the Supreme Court

in *Louisville & Nashville Ry. Co. v. Kentucky*, 183 U. S. 503, and in the *Intermountain Cases*, 234 U. S. 476, had decided that an absolute long and short haul prohibition is not contrary to the Federal Constitution, plaintiff in error states:

“We respectfully submit, however, that the learned District Judge was in error in two respects: first that the United States Supreme Court has never upheld the inflexible enforcement of a long and short haul clause—that is, an enforcement without any discretionary or relieving power being somewhere vested; and, second, that the provision of the Kentucky Constitution passed upon in 183 U. S. 503 is not substantially similar to the provisions of the old Section 21 of Article XII of the California Constitution.”

Although we have already discussed this matter at some length, we will further examine the decisions in the *Kentucky case* and in the *Intermountain cases*, in order to see just what the Supreme Court did decide in this regard.

It is very certain that in the *Intermountain cases*, the Supreme Court was of the opinion that in the *Kentucky case* it had held constitutional an absolute prohibition against charging more for short than for the long haul, because, as shown by the quotation from its opinion, *ante*, it refused to reconsider its decision in the *Kentucky case* that “*a general enforcement of the long and short haul clause*” was not repugnant to the Constitution.

With reference to the contention of “one of the

carriers" who was a party to the *Intermountain Cases* the Supreme Court said:

"It is said in the argument on behalf of one of the carriers that as in substance and effect the duty imposed upon the Commission in a proper case to refuse an application, therefore the law is void, because in such a contingency the statute would amount to an *imperative enforcement of the long and short haul clause* and would be repugnant to the Constitution."

The adjective "imperative" is by the Standard Dictionary defined as follows:

"Expressive of or containing positive as distinguished from advisory or discretionary commands."

The words "general enforcement" used by Mr. Chief Justice White mean nothing if they do not mean enforcement of an inflexible prohibition. *In fact it is most apparent both in the Kentucky case and in the Intermountain Cases that the Supreme Court was of the opinion that a prohibition with a relieving clause would not be constitutional unless the power existed in the legislature to enact an inflexible prohibition, so in both of these cases the Supreme Court directly held that an inflexible long and short haul clause was constitutional.* Nor were these decisions *obiter*, as in both cases it was assumed by the Court that the particular clauses there under consideration would be unconstitutional *unless there existed in the legislature the power to prohibit absolutely the charging of more for the shorter haul.*

In referring to the *Intermountain Cases* plaintiff in error makes no reference whatever to the portion

of the opinion quoted *supra*, but at page 69 of its brief quotes the following excerpt from the opinion:

“But while the public power, so to speak, previously lodged in the carrier is thus withdrawn and reposed in the Commission, the right of carriers to seek and obtain under authorized circumstances the sanction of the Commission to charge a lower rate for a longer than for a shorter haul because of competition or for other adequate reasons is expressly preserved, *and if not is in any event by necessary implication granted*. And as a correlative the authority of the Commission to grant on request the right sought is made by the statute to depend upon the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned, and in view of the Second and Third Sections.”

After quoting the foregoing plaintiff in error states:

“We take it, therefore, that in the Intermountain Cases the Supreme Court recognized the principle we contend for here, that any legislation which, without affording the carrier an opportunity of a day in court, establishes rates which are confiscatory or less than reasonable, or which ignore the compelling force of competition at the further point, operates to deprive the carrier of its property without due process of law.”

The portion of the opinion quoted, it will be ob-

served, has no reference to the constitutional question, but relates solely to the construction of the Fourth Section under which the Commission was authorized to permit in special cases, after investigation, a lesser charge for the longer than for the shorter distance.

As said by Mr. Chief Justice White in the portion of the opinion quoted by plaintiff in error there can be no doubt that by the Fourth Section of the Interstate Commerce Act the Commission had power to sanction a higher rate for the shorter than for the longer haul. Resort need not be had to implication for the English language could not make it plainer. But what possible connection has this with the contention of plaintiff in error that the Supreme Court did not in that case hold that an absolute long and short haul prohibition was constitutional?

It is remarkable that any carrier should persist in this contention in view of the fact that it has been twice held invalid by the United States Supreme Court. It is indeed remarkable that the contention should ever have been made. There are cases where it is a close question as to whether or not a statute violates the Fifth or Fourteenth Amendments, but there never was a question here. It certainly would never be contended that a state could not prohibit discrimination in charges as between persons or places, yet the prohibition against charging more for the shorter than for the longer distance is merely a prohibition against a particular kind of discrimination.

3. A PERSON WHO IS REQUIRED TO PAY MORE THAN THE LEGAL CHARGE FOR TRANSPORTATION OF FREIGHT HAS A COMMON LAW RIGHT TO RECOVER THE OVERCHARGE, AND IN ADDITION TO SUCH COMMON LAW RIGHT HAS THE STATUTORY RIGHT CONFERRED BY THE STATUTES OF 1909, 1911, AND THE PUBLIC UTILITIES ACT.

The complaint in this case states a cause of action under the common law and also a cause of action to recover damages under the statutes of 1909, 1911, and the Public Utilities Act. -

We will first reply to the contention of plaintiff in error that defendant in error has no cause of action "upon any common law theory."

Plaintiff in error cites *Cowden v. Pacific Coast S. S. Company*, 94 Cal. 470, in support of its contention that the plaintiff has no "common law" right of action. It may be conceded that at common law, that is, in the absence of a statutory or constitutional provision, the complaint in this case would not state a cause of action. The case of *Cowden v. Pacific S. S. Company*, *supra*, was an action involving a maritime contract which is governed by the Federal law. The objection was made that the Superior Court had no jurisdiction of the controversy, the contention being that jurisdiction was vested solely in a court of admiralty. Section 711 of the Revised Statutes of the United States saved to suitors the right of a common-law remedy when the common law was competent to give it. In order to sustain the contention that the courts of California had jurisdiction of the controversy, it was incumbent upon the plaintiff to show that the common law gave a right of action to recover against a carrier for charging more to one shipper

than to another for the same service, that is, for discrimination. The Supreme Court of California held, after a review of the authorities, that the common law gave no right of action to recover damages so sustained, although it was conceded that the common law gave a right of action for damages for charging an unreasonable rate. The decision was based upon the ground that discrimination was not forbidden by the common law.

But this decision does not support the contention of plaintiff in error that plaintiff has no cause of action to recover damages for a violation of the express prohibition of the Constitution. *In fact, the authorities therein cited clearly show that where a statute forbids the doing of an act, then the person, damaged by the act so forbidden has a full and complete cause of action.* This must necessarily be so. A cause of action to recover damages for charging an unreasonable rate exists at common law, because at common law it was illegal to charge more than a reasonable rate. *So where by statute discrimination is made illegal, or where by statute the charging of more for a short than for a longer haul is made illegal, it follows, as a matter of course, that a corresponding right of action must exist.* It exists for the same reason that it existed in the case where the act was contrary to the common law, that is, because the act is illegal. Whether it is illegal by reason of the common law, that is, by immemorial usage and custom, or whether it is illegal because so declared by the law-making power is wholly immaterial. There can be no reason for any such distinction, and no court has ever recognized that such a distinction exists.

That a shipper has a cause of action against a

carrier in a case where the carrier discriminates against him and in favor of another shipper, is clearly held in the case of *Great Western Ry. Co. v. Sutton*, 4 Eng. & Ir. App. 236, upon which the decision in *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, *supra*, is based. In that case Mr. Justice Blackburn held that at common law a shipper had no cause of action in such a case, but that he had a cause of action in the case before the court, because of the existence of the Act of Parliament regulating railroads, *one of the clauses of which prohibited discrimination*. After referring to the "equality clause" of the Act, the Justice said:

"I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, *the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable.* The mode of establishing that the demand is extortionate differs in the two cases. Where it is sought to prove that the charge is unreasonable, and therefore extortionate, the fact that another was charged less is only material evidence for the jury, tending to prove that the reasonable charge was the smaller one. When it is sought to show that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to show that the company carried for some other person or class of persons at a lower charge dur-

ing the period throughout which the party complaining was charged more under the like circumstances.”

Justice Blackburn further said :

“The excess might be recovered back under a count for money had and received.”

Referring to the case of *Garton v. Bristol*, 1 B. & S., 112, Justice Blackburn said :

*“If, as rather appears from the report to be the case, the decision went so far as to say that an action for money had and received would not lie where the overcharge was in breach of the statutable obligation to charge equally, as much as if it had been in breach of the common law obligation to charge reasonably; I think the decision was a mistake; and it was overruled in *Baxendale v. The Great Western Ry. Co.*, 16 C. B. (N. S.) 137, by the Court of Exchequer Chamber which comprised three out of the four judges who took part in deciding *Garton v. The Bristol and Exeter Ry. Co.*, in the Queen’s Bench.”*

The decision of Justice Blackburn was affirmed in the House of Lords. Lord Chelmsford, in delivering an elaborate opinion said :

“The last subject to be considered is the form of the action; whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff’s goods, not absolutely but relatively to the charges made to other persons. It was argued for the defendants that the charge upon the plaintiff’s packed parcels, being warranted by the 10 and 11 Viet., ch. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other

persons being charged less than he was. *But this is a fallacious way of viewing the question. The plaintiff's complaint is not that others are charged less than himself, but that the fact of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge.* The very fact of the smaller charge to others is the ground of his complaint of an overcharge to himself. Now, if the defendants were bound to charge the plaintiff for the carriage of his goods a less sum, and they refused to carry them except upon payment of a greater sum, as he was compelled to pay the amount demanded, and could not otherwise have his goods carried, *the case falls within the principle of several decided cases, in which it has been held that money which a party had been wrongfully compelled to pay under circumstances in which he was unable to resist the imposition, may be recovered back in an action for money had and received."*

By Section XC of the Railway Consolidation Act of 1845 (8, 9, Victoria pg. 251), *supra*, in which Act all existing statutes relating to railways were consolidated, it was provided:

"That all tolls be at all times charged equally to all persons, and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made directly or indirectly in favor of or against any particular person or company traveling upon or using the railway."

The Act of Parliament merely declared discrimination unlawful; it did not purport to give any cause of action to persons injured by the violation of the Act. That such cause of action existed necessarily followed from the declaration that discrimination was unlawful.

Great Western Ry. Co. v. Sutton, supra, is in principle identical with the case at bar, and conclusively disposes of the contention that plaintiff had no cause of action upon "any common law theory." Plaintiff in error has expended much labor in an endeavor to show that plaintiff has no *common law* right of action; but has entirely lost sight of the fact that whether the cause of action is based upon a violation of the common law or upon a violation of statutory law, is wholly immaterial.

At page 75 of the brief of plaintiff in error it is said that an action for money had and received will not lie "since the carrier is prohibited by Section 22 of Article XII of the Constitution, as it existed both before and after the amendment of October 10, 1911, and by the provisions of both the Wright and Eshleman Acts and the present Public Utilities Act, on pain of severe penalties from paying rebates or drawbacks from its published rates."

It must be apparent that the provisions of the Constitution and statutes against rebates can have no application to a claim for money illegally exacted by a carrier from a shipper. *A rebate is a drawback paid to a shipper by means of which the shipper secures the transportation of his freight for less than the legal rate.* Analyzed, this contention of plaintiff in error is: That the rates collected may be unconstitutional and illegal because they violate the Con-

stitution, yet plaintiff in error cannot refund the amount by which they exceed the legal rate because such refund would be a rebate. But it is apparent that *a rebate is a drawback from the legal rate and not the refund of an overcharge.*

After making the statement quoted above plaintiff in error further states:

“Therefore an action upon a common count as and for money had and received will not lie since it was not only not the duty of the carrier to restore the money but on the contrary was its duty not to restore it.”

We maintain that an action upon a common count for money had and received will lie for the reason that the carrier committed an unlawful act in receiving the illegal charge and that it is its positive duty to restore to the shipper the amount by which the charge collected exceeded the charge that the carrier was legally entitled to make.

Plaintiff in error's own argument shows that plaintiff has an action upon a common count for money had and received to recover these illegal charges, for its sole argument against the existence of such cause of action is based upon the palpably unfounded claim that the refund of an illegal charge constitutes a rebate.

The action in which was rendered the judgment reviewed in *Louisville & Nashville R. R. Co., v. Eubank*, 184 U. S. 27, was to recover the difference between the rate charged the plaintiff for the short haul and the lower rate charged for the longer distance. Apparently it was never questioned that the plaintiff was entitled to recover, provided the long

and short haul provisions of the Kentucky Constitution applied to the facts of that case. The Supreme Court held that they could not constitutionally apply because the long haul point was in another State.

In one sense the right of action here may not be a common law right of action, that is, it may not be an action which could have been maintained at common law for the reason that the charging of more for the short than for the long haul may not have been forbidden by the common law; but in another sense it is a common law right of action, that is, it is founded upon the common law principle that a person who is required to pay to a carrier more than the legal charge is entitled to maintain an action to recover the overcharge.

In the debate before the Constitutional Convention of 1879 Mr. Howard, with reference to the objection that Sections 21 and 22 (then Sections 19 and 20) furnished no remedy, said (pg. 563) :

“Nay, more, sir; it is provided that any private party injured may also sue the railroad, and the result would be that if it discriminated between places, managing them unjustly, *that if it charged more for a short distance than for a long one on the same line, the party might pay under protest and sue the company for a return of the money and his damages.* Therefore it is a misstatement, or a gross misunderstanding of that section, to say that it furnishes no remedy. Nobody knows better than the learned gentleman from Sacramento, that a private party who is injured could pay under protest and bring his action for a return of the money and damages.”

In *Twells v. Pa. R. R. Co.*, 2 Walker 650 (3 Am. Law Reg. N. S. 728), which was a bill in equity to

enjoin the carrier from charging more for the transportation of oil from Pittsburg to Philadelphia than the carrier charged for transporting oil from other shippers to Philadelphia where its ultimate destination was New York. The injunction was granted and the carrier was required to account to the plaintiff for the difference between the rates charged him to Philadelphia and the low rates given to other shippers who shipped through Philadelphia to New York. This decision was by the Supreme Court of Pennsylvania, although it was not reported in the official reports of that court. In citing the case, the United States Circuit Court for the District of Colorado (15 Fed. 656), said that it was undoubtedly authoritative, as it was cited by the Supreme Court in later cases.

Central Iron Works v. Pennsylvania R. R. Co., 17 Pa. Co. Ct. 651, was a suit in equity to enjoin the carrier from charging more for the short haul. It appeared that plaintiff had already brought an action at law to recover for the overcharges theretofore made. It was held that equity had jurisdiction and that the pendency of the action at law was no defense.

It appears that Section 3 of Article XVII of the Pennsylvania Constitution (from which the prohibition of Section 21 of our Constitution was taken) was adopted from an Act of the legislature of Pennsylvania (March 7, 1861, P. L. 88), which provided that the local rates from Pittsburgh to stations intermediate between Pittsburgh and Philadelphia, should at no time exceed the rate to Philadelphia (*Central Iron Works v. Penn. R. R.*, 17 Pa. Ct. 652).

After referring to this Act and to the cases where

actions in assumpsit had been sustained, the court in *Central Iron Works v. Pa. R. R.*, *supra*, said:

“From these cases it is manifest that under this Act *there was concurrent jurisdiction by action at law or bill in equity*, and we can see no reason why this is not so under the clause of the Constitution in question, which is, as we have seen, the same in substance as the Act of 1861.”

Plaintiff in error states that no “remedy” is provided by the constitutional provision and consequently charges exacted in violation thereof cannot be recovered. It is said (pg. 78):

“If it (the statute) does not prescribe a remedy and no remedy exists under the common law or under another statute, an individual injured by a violation of the statute has no right of action.”

In support of this contention plaintiff in error cites the case of *Ward v. Severance*, 7 Cal. 126. In this case a statute forbade the establishment of a ferry within a mile of a duly licensed ferry, and provided that any person establishing a ferry should be guilty of a misdemeanor. The defendant, who so established a ferry, was sued for damages by the owner of another ferry within a mile. In this class of cases it would seem clear that no civil action for damages lies; although the Court said that its conclusion was strengthened by the fact that a former act providing a remedy by a civil action had been repealed.

The next case cited, viz.: *Savings Association v. O'Brien*, 51 Hun. 45, is direct authority in support of defendant in error's position that a cause of action does exist. In that case the court had under consid-

eration a statute imposing liability on stockholders of corporations. The court said:

“A general liability created by statute without a remedy may be enforced by a common law action, but where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed.”

The quotation from *Young v. Kansas City, Etc., Ry. Co.*, 33 Mo. App. 509 (page 81 of brief), where the court said: “The legislature has revised the whole subject of the carrying of freight, and has evidently intended that the provisions of the statute shall be a substitute for the common law,” is also direct authority to the point that the prohibition against charging more for the short than for the long haul stands on the same footing as does the common law prohibition against unreasonable rates; and that a similar remedy exists in the case of its violation.

In the case of *Mack v. Wright*, 180 Pa. St. 472, cited by plaintiff in error, a statute made it the duty of persons constructing buildings to cover the floor joists so that laborers would not fall from one floor to another. The statute also imposed a penalty for the violation of this statute. The court held that no person injured by a violation of the statute had a cause of action for damages because it was to be supposed that if the legislature had intended that a party injured by a violation of the statute should have a right of action it would have said so, in view of the fact that the statute did give a remedy to the State to recover a penalty for such violation. If the penalty had not been provided for, it is quite clear that the court would have held the plaintiff entitled to recover.

Janney v. Buell, 55 Ala. 408, also gives no support to the contention of plaintiff in error, but does support the position of defendant in error. After referring to the principle that at common law there was an appropriate remedy for the enforcement of every right, the court said:

“But this principle applies only to common-law rights and does not extend to rights created by statutes, *for the enforcement of which the statute itself provides a specific though inadequate remedy.*”

In the case at bar the constitutional provision did not provide a specific remedy.

Plaintiff in error cites the case of *Fielders v. N. J. St. Ry. Co.*, 68 N. J. L. 343. In this case the court considered the effect of an ordinance regarding street railway corporations to keep in repair the part of the street adjacent to their tracks, and providing that if they did not do so the city might do so and the company should pay the cost. A traveler injured by reason of a defective sidewalk sued the city for damages. In holding that he had no cause of action the court said:

“We find running through the adjudicated cases a rule of construction almost universally adopted, that where the provisions of an ordinance are intended, *not for the benefit or protection of individuals comprising the public, but for the benefit of the municipality as an organized government*, and more particularly if they impose upon property owners the performance of a part of the duty of the municipality to the public, a legislative intent is indicated that a breach of such ordinance shall be remedial only at the instance of the municipal

government or by the enforcement of the penalty prescribed therein; and that there shall be no right of action to an individual citizen especially injured in consequence of such breach."

And in *Taylor v. Lake Shore, Etc., Co.*, 45 Mich. 74, also cited by plaintiff in error, which was a similar case, the court said:

"For if it was only a public duty it cannot be pretended that a private action can be maintained for a breach thereof."

In *Heeney v. Sprauge*, 11 R. I. 456, next cited, a municipal ordinance required the removal of snow from the sidewalk by the owners of adjoining premises. Plaintiff was injured by falling on the sidewalk due to the fact that the snow had not been removed. In holding that such person had no cause of action against the property owner the court said:

"The defendant has not done anything injurious to others which she was forbidden to do; she has simply left undone something beneficial to others which she was not required to do under a penalty in case of default."

But in this case the plaintiff in error has done something injurious to defendant in error's assignors which it was forbidden to do. The defendant has charged a higher rate for the shorter distance and this it was expressly forbidden to do by the Constitution.

In the following cases the courts held that a shipper who paid more for the shorter distance than the carrier charged for the longer distance, in violation of a prohibition similar to that contained in our Constitution was entitled to recover the difference be-

tween the charges paid by him and the lesser charge to the more distant point:

Louisville & N. Ry. Co. v. Walker, 63 S. W. 20 (110 Ky. 961).

Hutchinson v. R. R. Co., 57 S. W. 25 (Ky.).

Junod v. C. & N. W. Ry Co., 47 Fed. 290.

Osborne v. C. & N. W. Ry. Co., 48 Fed. 49.

Twells v. Penn. R. R. Co., 2 Walker 650 (2 Am. Law Reg. N. S. 728 (Penn. Supreme Court)).

In *Twells v. Penn. R. R. Co.*, *supra*, the greater charge for the shorter haul was held contrary to the common law and the shipper who paid it held entitled to recover the difference between such charge and the lesser charge made for the longer haul.

The cases in the 47th and 48th Federal Reporter were reversed by the Circuit Court of Appeals in 52 Fed. 912, on the ground that the evidence showed no violation of the 4th section of the Act, but the instructions as to the measures of damages given by the Circuit Court were not questioned.

In *Louisville & Nashville R. R. Co., v. Eubank*, 184 U. S. 21, it was assumed that such was the proper measure of damages.

Louisville & N. Ry. Co., v. Walker, 110 Ky. 961, *supra*, was an action to recover the difference between the charge made for the short haul and the lesser charge made for the longer haul. In holding that the plaintiff was entitled to recover, the Supreme Court of Kentucky said:

“If a carrier charges a shipper more than the law allows him to charge, the excess so paid may

be recovered by the shipper. If there had been a statute fixing the charge from Cave City to Louisville at 20 cents and appellant had charged 29 cents the excess so paid above the legal rate might be recovered, on the ground that it had been illegally exacted.

Further the court said:

“As one means of protecting the local shipper, this section fixed a maximum limit, beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When the charge for the longer haul is fixed, to charge more for the shorter haul is as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum certain as the limit of the charge. The carrier is allowed by the Constitution to fix the rate for the longer haul, but when he so fixes it this rate is the limit, beyond which he cannot go in charging for the same service in the shorter haul. And, when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to charge. To illustrate: If it had been provided by statute that appellant should charge no more for hauling tobacco than it charged for hauling other like freight, and appellant, while charging 20 cents a hundred for hauling like freight, had charged appellee 29 cents a hundred for hauling his tobacco, it would be clear that the 9 cents a hundred had been taken from appellee in violation

of law, and it would be no defense for appellant to say that appellee was not prejudiced by its giving lower rates to other freight, and it did not hurt him in any way that other people were charged less than they ought to have been charged; for in such a case the excessive charge for carrying the tobacco would be illegal."

Junod v. Chicago & N. W. Ry. Co., 47 Fed. 29, *supra*, was also an action to recover the difference between the amount charged for the short haul and the lesser charge made for the longer distance. The action involved interstate shipments. At the time the shipments moved the Fourth Section of the Interstate Commerce Act contained the clause "under substantially similar circumstances and conditions." In charging the jury the Court said:

"The question, therefore, for determination is this: Are you satisfied from the evidence in the case that the defendant railway company did in fact, between the dates named, have a tariff rate in operation, either its own tariff or by arrangements made with other roads, *whereby it undertook the transportation of grain and corn from Blair and other points in Nebraska, to Chicago, Ill., or other eastern points, at a rate less than it was charging for the like service to the shippers at Carroll, Iowa, that being a point upon its main line through which these shipments were made from Nebraska, to points east?* The duty and obligation placed by the law upon the railway company is that it shall not give any undue preference or advantage to any person or persons; that it shall not give undue preference to one locality over other localities; that it shall not discriminate between the rates that are furnished Nebraska shippers and the rates from Iowa points. Of course, when we speak of undue preference or undue discriminations, these questions

must be viewed with reference to all the circumstances that surround the transaction. *It must appear that it is for the like services, and under similar circumstances or otherwise the mere difference in the rate would not necessarily show that an undue preference was given.* Assuming that you will find under the evidence that there was a tariff rate put in operation and effect by the defendant railway company from Blair and other points in Nebraska, by which corn and oats were in fact shipped at a rate substantially of 11 cents from Blair—for instance, to Chicago, Ill.,—*is there or is there not anything shown in the case that would justify you in finding that there was any circumstance or circumstances that would justify the company in charging the increased rate for doing the same kind of business—that is, shipping corn and oats—at the same time, from Carroll, Iowa, to Chicago, Ill., than for parties shipping from Blair and other points in Nebraska?* Now, as I understand it, Carroll, Iowa, is a point nearer to Chicago, Ill., and other eastern points, than is Blair, Neb.; the kind of property forwarded is of the same nature; the distance that is passed over in going from Carroll, Iowa, is less than the distance that would be passed over in going from Blair, or other points in Nebraska to Chicago, Ill., or other eastern points. Is there, therefore, anything shown in the evidence that would show such a dissimilarity in the circumstances, or in the work done, or in the property that was being forwarded, that would authorize you in finding that the company was justified in charging the larger rate for making transportation from Carroll, Iowa—the shorter distance—to Chicago, Ill., and other eastern points, than the rates charged from Blair and other points in Nebraska? *If there is no evidence to show any dissimilarity in these particulars then of course, there is nothing that would justify you in finding that the company was excused*

from the effect of this larger rate that was put in force upon the grain or property forwarded from Carroll, Iowa, as compared with that charged for grain forwarded from Blair and other points in Nebraska."

The court further said:

"If a party, under the law, is entitled to have the same rate,—that is, if the shipper at Carroll, Iowa, was entitled to have the same rate charged him for the forwarding of his property from Carroll, Iowa, to Chicago, Ill., as the shipper at Nebraska, and he was charged more—the damage to him is the difference between the rates that he was thus called upon to pay and the lesser rate charged the Nebraska shipper. If the tariff rate from Blair and other points in Nebraska was 11 cents and the plaintiffs had to pay 19 cents; if, under the law, as I have instructed you, the duty and obligation was on the railway company to give the benefit to the shippers at Carroll, Iowa, of the same rate—of an equal rate with that given to the shippers from Blair and other points in Nebraska—you see the damage to the parties who have been compelled to pay this higher rate is the difference between that and the lesser rate."

Not only does the complaint in this action state a cause of action at common law—to recover an over-charge, but it also states a cause of action for damages under the Act of 1909, the Act of 1911 and the Public Utilities Act.

Statutory
Right of
Action

The statute of 1909 (Stats. 1909: 499) was effective between March 19th, 1909, and February 9, 1911. The Act of 1911 (Stats. 1911: 13) was effective between February 9, 1911, and March 23, 1912. The Public Utilities Act (Stats. Extra Session 1911: 18) became effective March 23, 1912. The Act of 1909 is

sometimes called the "Wright Act," and the Act of 1911 the "Eshleman Act," but we will here refer to them as the statutes of 1909 and 1911, respectively.

Some of the causes of action stated in the complaint accrued while the statute of 1909 was in force, some while the statute of 1911 was in force, and the remainder while the Public Utilities Act was in force. It will be unnecessary to segregate them, however, as the provisions of all three statutes conferring a right of action for damages are practically identical.

The Public Utilities Act *expressly* provides that if any carrier shall do any act forbidden or declared to be unlawful by the Constitution it shall be liable to the person damaged thereby for all loss, damages, or injury sustained by such person. And that an action to recover such loss, damage, or injury may be brought in any court of competent jurisdiction. These provisions are contained in Section 73 (a), which reads as follows:

"Sec. 73. (a) In case any public utility shall do, cause to be done or permit to be done *any act, matter or thing prohibited, forbidden or declared to be unlawful*, or shall omit to do any act, matter or thing required to be done, *either by the Constitution, any law of this State or any order or decision of the Commission*, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom, and if the court shall find that the act or omission was willful, the court may in addition to the actual damages award damages for the sake of example and by way of punishment. *An action*

to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation, or person."

The corresponding sections of the Acts of 1909 and 1911 do not expressly refer to violations of the Constitution but both acts contain express provisions declaring discrimination unlawful whether between persons or places, and both acts confer a right of action for damages upon any person damaged by discrimination.

The provisions of the Act of 1909 declaring discrimination unlawful are contained in Section 34, which reads as follows:

"Sec. 34. It shall also be unjust discrimination for any such transportation company to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, in any respect whatsoever, or to subject any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or in particular description of traffic to any undue or unreasonable prejudice of disadvantage in any respect whatsoever."

The provisions of the Act of 1911 prohibiting discrimination are contained in Sections 22 and 41. Section 22 is as follows:

"If any railroad or other transportation company, subject hereto, shall directly or indirectly, by any special rate, rebate, drawback, or other practice, method or device, charge, demand, col-

lect, or receive from any person, company, firm or corporation, a greater, less or different compensation for any service rendered or to be rendered by it in the transportation of passengers or freight, than it charges, demands, collects or receives from any other person, company, firm or corporation, for doing a like service in the transportation of a like kind of traffic, such railroad or other transportation company shall be deemed guilty of discrimination, and it shall also be discrimination for any such railroad or other transportation company to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to any particular person, company, firm, corporation or locality, or to any particular description of traffic in any respect whatsoever, or to subject any particular description of traffic of any particular person, company, firm, corporation or locality, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, and it shall also be discrimination for any railroad or other transportation company, or any officer or agent of any railroad or other transportation company to charge, collect, demand, or receive from any person, firm or corporation, a greater, less or different compensation established as in this act provided, and in so far as such discrimination shall be in violation of any order or orders of the commission, it shall be a contempt of said commission, and any railroad or other transportation company or officer or agent thereof practicing or permitting such discrimination, shall be punishable by the commission for such contempt in the same manner and to the same extent as contempts are pun-

ishable by courts of record, and such railroad or other transportation company practicing such discrimination, shall also be punishable by a fine not exceeding five thousand dollars for each offense, and every officer, agent or employee of such railroad or other transportation company practicing or permitting such discrimination shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

Section 41 of the Act of 1911 is as follows:

"It shall be unlawful for any person, persons, or corporations to offer, grant, or give or to solicit accept or receive any rebate, concession or discrimination in respect to the transportation of any property in this state whereby any such property by any device whatever shall be transported at a less rate than that stated in the rates made and established by the commission, *or whereby any other advantage is given or discrimination is practiced.* Every person or corporation, whether railroad or other transportation company or shipper, who shall, knowingly, offer, grant or give, or solicit, accept, or receive any such rebate, concession or discrimination shall be guilty of a misdemeanor and on conviction thereof shall be punishable in like manner and to the same extent as herein prescribed for discrimination."

The provisions of the Act of 1909 conferring a statutory right of action for a violation of the Act are contained in Section 38, which reads as follows:

“Sec. 38. *In case of any transportation company subject to this act, or any person or corporation within the provisions hereof, shall do, cause to be done, or permit to be done, except unintentionally or innocently through a mistake of fact, any matter, act or thing in this act prohibited or declared to be unlawful, or shall similarly omit to do any act, matter or thing herein required by this act to be done, such transportation company, person or corporation shall be liable to the penalties hereinbefore provided for, and shall, in addition, be liable to the person or persons, firm or corporation injured by such act or omission for the damages proximately resulting therefrom;* and in addition to such damages, such transportation company, in all cases where the same shall be guilty of extortion or unjust discrimination as defined in this act, shall pay to such person, firm or corporation so injured a penalty of not less than five hundred dollars and not more than five thousand dollars.”

The corresponding provisions of the Act of 1911 are contained in Section 43, and are as follows:

“Sec. 43. *In case any railroad or other transportation company subject to this act shall do, cause to be done, or permit to be done any matter, act, or think in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad or other transportation company shall be liable to the person or persons, firm or corporation injured thereby for the damages sustained in consequence of such violation.*”

From the foregoing it is very clear that both the

Acts of 1909 and 1911 declared discrimination unlawful, and conferred a right of action for damages upon any person injured thereby.

The charging of more for the short than for the long haul is merely a specific kind of discrimination. The long and short haul prohibition of Section 21 of Article XII of the Constitution (both in the original section and in the section as amended October 10, 1911) immediately follows the general prohibition against discrimination.

As the Acts of 1909 and 1911 were enacted in pursuance of the Constitution, and as all their provisions are controlled by the constitutional provisions, the provisions of the Acts prohibiting discrimination or preferences as between persons and localities must be construed to prohibit what the Constitution forbids. To hold otherwise would be to violate a cardinal rule of statutory construction.

The charging of more for the short than for the long haul is discrimination. That the charging of more for the short than for the long haul is discrimination was held by the Appellate Court for the Second Appellate District in the very recent case of *Southern Pacific Company v. Superior Court of Kern County* (20 Cal. App: Dec. 674, 680), where the Court said:

“It should be kept in mind that Sec. 21 of Art. XII of the Constitution, both before and after the amendment of Oct. 10, 1911, contains a prohibition against discrimination in charges between places, and that the so-called long and short haul clause, following the general prohibition against discrimination, is a particular application of the rule as first stated in general terms.”

In *Southern Pacific v. Superior Court of Kern County*, 50 Cal. Dec. 36, the Supreme Court denied a rehearing after decision by the District Court of Appeal.

In view of these decisions of the California courts, it is somewhat superfluous to cite additional authorities. However, the Courts have uniformly so held.

In *Chicago & Alton R. R. Co. v. People*, 67 Ill. 11, the Court, in considering the constitutionality of the Illinois Statute of 1871, one of the clauses of which provided that no railroad should charge greater compensation for freight over any portion of its road than it charged for the transportation of freight over any other of equal length, said:

“If, then, an unjust discrimination is not to be permitted as between individuals in regard to freights, is it any more permissible as between different communities or localities? We are wholly at a loss to discover the slightest difference in reason or principle. If a farmer, living three miles from the Springfield station upon this company’s road, is charged fifteen cents per bushel for shipping his corn to Chicago, is it just that the farmer who lives twenty miles nearer Chicago should be charged a higher sum? Certainly not, unless the railway company can show a peculiar state of affairs to justify the discrimination, and this must be something more than the mere fact that there are competing lines at one point and not at the other. The discrimination, in such a case, is as much a discrimination between individuals as it would be in reference to two persons living in the same locality, and shipping at the same station, unless, as before stated, a satisfactory reason can be given for discrimination between the points of

shipment, and such a reason, in the case supposed, it is not very easy to conceive.

“So, too, in the case before us. The resident of Bloomington who sends to Chicago for a car of lumber, is charged by the company at the rate of five dollars per thousand feet for transportation. The resident of Lexington, who orders the same lumber at the same time, is charged five dollars and sixty-five cents per thousand feet for a transportation sixteen miles less in distance. Is there not here, unless an explanation can be furnished by the company, an unjust discrimination between individuals, quite as much within the prohibition of the principles of the common law as would be an unjust discrimination between individuals of the same town?”

The case of *Chicago & Alton R. R. Co. v. People*, 67 Ill. 11, *supra*, was cited in the Constitutional Convention of 1879, in the debate upon Section 21 of Article XII of the Constitution.

The plaintiff in error does not contend that the charging of more for the shorter than for the longer distance is not discrimination, but to contrary affirms that it is discrimination. In the argument made at page 32 of its brief in support of the contention that the long and short haul clause in terms sought to regulate interstate commerce, the statement is made that “the section is one prohibiting discrimination,” and at page 39 it is said, “We think the section should be construed as an entirety, as an effort to forbid discrimination.”

From the foregoing it follows:

(a) *That the Statutes of 1909 and 1911 prohibit discrimination of all kinds.*

(b) *That the charging of more for the shorter than for the longer distance is discrimination.*

(c) *That the Statutes of 1909 and 1911 confer a right of action for damages upon any person injured by such discrimination.*

(d) *That the Public Utilities Act expressly confers a right of action for damages upon any person injured by a violation of the prohibition against charging more for the shorter than for the longer distance.*

At page 75 of the brief of plaintiff in error the following statement is made :

“The complaint contains no allegation of general or special damage and no proof of any general or special damage was offered or admitted.”

The complaint states the facts from which it follows as a matter of law that damage has resulted. The fact and measure of damage both conclusively appear from the complaint. No evidence in support of these allegations were necessary as they were admitted by the answer.

Discrimination under the Interstate Commerce Act and under the laws of California may or may not involve a prior determination by the Commission. And where discrimination is proved the measure of damages may or may not be fixed as a matter of law. Whether or not resort need be first had to the Commission depends upon the nature of the discrimination, and whether or not the measure of damage appears from proof of discrimination depends likewise upon the nature of the discrimination proved.

Robinson v. B. & O. R. R. Co., was a case involving a species of discrimination where it was incumbent upon the plaintiff to first obtain a determination of the Commission that the act complained of amounted to discrimination. The alleged discrimination consisted in charging plaintiff 50 cents more per ton for the transportation of coal loaded into the cars from wagons than defendant charged for such transportation where the coal was loaded from tipples. Defendant's tariffs specified this difference in rates on coal loaded from wagons and tipples.

On the other hand the case of *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, involving discrimination by giving another shipper the benefit of a lower rate for the same service than was charged the plaintiff, was not a case where it was necessary that there should be any prior determination by the Commission as the statute itself made the act unlawful and no rate-making question was involved.

With reference to the measure of damages the case of *Penn. R. R. Co. v. International Coal Co.*, *supra*, was a case where the measure of damages caused by the discrimination did not appear upon proof of the discrimination. As pointed out by the Supreme Court, the charging of some other shipper less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate. In replying to the contention of the plaintiff that the common law measured the damages in such a case by the difference between the lawful rate paid by the plaintiff and the unlawful rate accorded another shipper, the Supreme Court said:

"We are cited to no authority which shows that there was any such ancient measure of dam-

ages and no case has been found in which damages were awarded for such discrimination."

In the case at bar, however, the measure of the plaintiff's damage conclusively appears from the fact of the discrimination, for the plaintiff's assignors were charged an unlawful rate and the law in terms provided what the lawful rate should be. It was a mere matter of calculation to determine the amount of the damage. Possibly a person required to pay more than the lawful rate may be damaged beyond the extent of the difference between the lawful and the unlawful rate, but if he were, such special damages would have to be pleaded and proved. In any event the measure of his damage was at least the difference between the unlawful rate charged and the lawful rate which should have been charged.

It is not contended by plaintiff in error that the complaint should state the conclusion that plaintiff was "damaged." It is conceded that "a statement of the fact from which the Court will imply general damage" is sufficient. (Brief, page 75.)

The contention of plaintiff in error that the complaint does not state a cause of action for damages under the Statute is based upon a misapplication of the decisions of the Supreme Court of the United States and the other Federal Courts in construing the Act to Regulate Commerce, Section 8 of which is practically the same as the above quoted provisions of the California Statutes.

The first case cited is *Knudsen & Co. v. Michigan Central Ry.*, 148 Fed. 969, 974. In that case the Circuit Court of Appeals for the Eighth Circuit, as appears from the excerpt from its opinion quoted at page 87 of the brief of plaintiff in error, stated:

“To support a recovery under this Section (Section 8) there must be a showing of some pecuniary injury. A cause of action does not necessarily arise from those acts or omissions of a common carrier that may subject it to a criminal prosecution by the Government. * * * He must show, either that there has been some unreasonable or excessive charge imposed, or some unlawful discrimination practiced against him.”

Referring to the evidence in the case, the Court said:

“It does not appear that any discrimination of any kind or character was practiced against it (the plaintiff).”

In *Knudsen & Co. v. M. C. Ry.*, 148 Fed. 969, *supra*, the plaintiff sought to recover certain sums paid the carrier for icing in transit carloads of fruit shipped by the plaintiff. The Court held that the second-class rate specified in the schedules (under which the shipments moved) applied to many commodities not moved under refrigeration, and did not include compensation for the icing of cars containing fruit which did require refrigeration.

The complete answer to the contention of plaintiff in error is furnished by the very decision which is cited in support of the contention. In the case at bar discrimination was practiced against plaintiff's assignors and such discrimination resulted in the imposition of excessive charges.

Plaintiff in error also cites *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, in support of this contention and the statement of Mr. Justice Lamar that “before any party can recover under the act

he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury" is quoted.

In *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, which was an action to recover damages for rebating, the Supreme Court held that the plaintiff was entitled to damages, but that the measure of the damages was not necessarily the difference between the rate paid by plaintiff and the lower rate obtained by other shippers through a rebate. Plaintiff obtained judgment in the trial court and the railroad company brought the case to the Supreme Court by writ of error. The plaintiff contended that as a matter of law it was entitled to recover as damages the difference between the rates which it paid and the lower rate accorded to other shippers by reason of rebates. *The plaintiff was in effect suing to obtain similar rebates.*

It appears that in the original Bill to Regulate Commerce, which passed the Senate May 12th, 1886, it was provided that the carrier "should be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period. This provision was omitted from the Act as finally passed, and the Supreme Court held that the fact of this omission was conclusive against the plaintiff's claim.

In its opinion, the Court said:

"Having paid only the lawful rate, the plaintiff was not overcharged, though the favored shipper was illegally undercharged."

The Court further stated:

“Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers, and if having paid a rebate of 25 cents per ton to one customer, the carrier, in order to escape the suit, had made a similar undercharge or rebate to the plaintiff, it would have been criminally liable, even though it may have done so in order to equalize the two companies.”

The Supreme Court further said:

“To adopt such a rule and arbitrarily measure damages by rebates would create a legalized but endless chain of departures from the tariff; would extend the effect of the original crime, would destroy the equality and certainty of rates, and, contrary to statute, would make the carrier liable for damages beyond those inflicted and to persons not injured.”

Let us contrast the section of the Interstate Commerce Act under consideration in the case of *Penn. R. R. Co. v. International Coal Co.*, *supra*, with the prohibition of Section 21 of the Constitution of California. Section 21 of the Constitution provided that persons and property transported over any railroad should be delivered at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Section 2 of the Interstate Commerce Act reads as follows:

“Section 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons, a greater

or less compensation for any service rendered, or to be rendered in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.”

The provision of the Constitution is for the benefit of the shipper, and in express terms confers upon him the right to have his property transported at charges not exceeding those made by the carrier to the more distant point. The provisions of Section 2 of the Interstate Commerce Act merely declares unlawful the charging of one shipper a lower rate than is charged another. It does not provide that every shipper shall be entitled to the same rate that is accorded the favored shipper, nor that property transported shall be delivered at charges not exceeding the charges made to any other person for the same service. Clearly, Section 21 of the Constitution was intended to fix as the legal rate to the intermediate point the rate charged to the more distant point; but Section 2 of the Interstate Commerce Act does not purport to fix the legal rate for a particular service at the rate charged a favored shipper for the same service.

Nevertheless the Supreme Court would undoubtedly have held the plaintiff in the case of *Penn. R. R. Co. v. International Coal Co.*, *supra*, entitled

to recover the difference between the charges paid by it and that paid by the favored shippers, if it had not been for certain considerations which the majority of the Court held to be controlling.

One of these considerations, already adverted to, was the fact that Section 2 of the Bill as it originally passed the Senate, contained a provision that the carrier shall be liable to all persons who have been charged a higher rate than was charged any other person or persons, for the difference between such higher rate and the lowest rate charged upon like shipments during the same period; but that such provision was omitted from the act as finally passed by Congress.

The violation of the act complained of in *Penn. R. R. Co. v. International Coal Co.*, *supra*, was of the same character as the violation complained of in *Great Western Ry. Co. v. Sutton*, L. R. 4, H. L. 226 (1869), *supra*, where the English courts held that the plaintiff was entitled to recover the difference between what he paid and the lesser amount charged to the favored shipper. *But the English Act contained no provision similar to Section 8 of the Interstate Commerce Act.*

Furthermore, the decision in Penn. R. R. Co. v. International Coal Co., *supra*, was based upon the law that the carrier was not lawfully entitled to charge a lower rate than the rate published in its tariff. By the Interstate Commerce Act the carrier is forbidden to charge more or less than the rate specified in its tariffs, whereas the Act of Parliament contained no such provision. Therefore the English courts in *Great Western Ry. Co. v. Sutton*, *supra*, held, in effect, that the lower rate accorded to the

favorable shipper was the lawful rate. Having held that such lower rate was the lawful rate, it followed that any charge in excess of such rate was extortionate and recoverable in an action for money had and received. This is clearly pointed out by the Supreme Court in *Penn. R. R. Company v. International Coal Co.*, *supra*, where the Court, at page 202, said:

"The Act of Parliament did not require the carrier to maintain its published tariff but made the lowest rate the lawful rate. Anything in excess of such lowest rate was extortion, and might be recovered in an action at law as for an overcharge. Denaby v. Manchester Ry., L. R. 11 App. Cases 97, 116. But the English courts make a clear distinction between overcharge and damages, and the same is true under the Commerce Act. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted that it had only paid the lawful rates named in the tariff. Of course, no part of such payment of lawful rates can be treated as an overcharge or as an extortion."

And herein lies the chief distinction between the right of the plaintiff here and the right of the plaintiff in the *International Coal Company* case, *supra*. The tariff rate paid by the plaintiff in the *International Coal Company* case was the lawful rate; but the rate charged the plaintiff in this case was not the lawful rate, because expressly made unlawful by the Constitution. In the *International Coal Co. case*, *supra*, the plaintiff sought to recover the difference between the lawful rate which it

paid and the unlawful rate charged another shipper. *The plaintiff here was not seeking to recover the difference between a lawful rate which he paid and an unlawful rate paid by another person, but was seeking to recover the difference between the unlawful rate which he paid and the lawful rate which should have been charged.*

In the case of the Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, supra, the Supreme Court held that the giving of an unlawful rebate to one shipper did not fix the measure of the plaintiff's damage at the difference between the unlawfully low rate accorded the favored shipper and the lawful rate paid by plaintiff.

But in the case at bar, the assignors of defendant in error were charged an unlawful rate. The complaint alleges the facts showing the difference between the unlawful rate which was charged and the lawful rate which should have been charged. The damage to the assignors of defendant in error resulted as a matter of law. Both the fact and measure of damage conclusively resulted from the facts pleaded in the complaint and admitted by the answer.

We have shown *ante* that the statutes of 1909 and 1911 made discrimination unlawful and conferred a right of action upon any person damaged by discrimination. We have also shown that the charging of more for the shorter than for the longer distance was discrimination.

But the statutory right of action exists here wholly independent of the provisions of the statutes of 1909 and 1911 prohibiting discrimination. *Both statutes*

forbid a carrier to charge more than the lawful tariff rate. When the plaintiff published in its tariff the lower rate for the longer distance that lower rate became the maximum rate which it could lawfully charge to intermediate points. The lower published rate to the more distant point was the tariff rate for all intermediate points, and when the plaintiff in error charged a greater sum than the published rate for the longer distance it charged in excess of the tariff rate for the shorter distance, thereby violating the express prohibitions of the Acts of 1909 and 1911 against charging more than the published rate.

The Constitution as it now exists provides that no carrier shall charge more for a long haul than it charges for the sum of the intermediate hauls. If, for example, the published tariff rate from San Francisco to Bakersfield on a given commodity was 40 cents per hundred pounds, and the rate from San Francisco to Fresno was 20 cents, and the rate from Fresno to Bakersfield 10 cents, the lawful tariff rate to Bakersfield would be 30 cents and not 40 cents. The courts and the railroad commissions have uniformly so construed tariffs where such a statute existed. The situation is precisely analogous to that arising under the provisions of the Constitution prescribing that property shall be transported for the shorter distance at charges not exceeding those made for the longer distance.

Under the fifth head of this brief, where the contention of plaintiff in error that, as to the causes of action which accrued after October 10, 1911, 'the Commission granted permission to charge more for the shorter distance is replied to, we shall refer to the various orders of the Commission made after

the amendment to the Constitution. Although the Commission unquestionably entertained an erroneous view of its powers under this amendment, its views in relation to the effect of the published rate to the long haul point are unquestionably correct. By its order of January 16, 1912, appearing at pages 425 and 426 of the Record, it is provided:

“As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date, the provisions of said Section 21, Article XII, of the Constitution will at once become operative, and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included within the longer distance, and the aggregate of the intermediate rates or fares will become the through rate or fare in cases in which the through rate or fare is now in excess of the aggregate of the intermediate rates or fares.”

Plaintiff in error seems to have some not well defined idea that the complaint does not state facts from which damage will be inferred as a matter of law because “most of the assignors of the defendant in error seem to be mercantile firms which have probably passed on the so-called excessive charge to their customers. It is also said that the Interstate Commerce Commission has held “that the doctrine of reparation does not obtain in such a case where the charge has been passed on to others by the person paying it, and where such person has not shown any damage to himself.”

If plaintiff in error means to contend that the

owner of property who pays an unlawful charge for its transportation is not entitled to recover damages for the exaction of such charges unless he can show that he did not "pass on" the charge to his customers then the plaintiff in error has been laboring under a very serious misapprehension of the law. The Interstate Commerce Commission in numerous cases has held directly to the contrary. In *Burgess v. Trans-continental Freight Bureau*, 13 I. C. C. 688, 679, the Commission in replying to the contention of the carrier that the complainant was not damaged "because the advance in the freight rate had been added to the price paid by the customer," said:

"It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word 'damage' is to be interpreted and applied as claimed by the defendants.

"Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was, in fact, exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount

because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity."

In *Kindelon v. S. P. Co.*, 17 I. C. C. 251, 255, the Commission said:

"The defendants further contend that the complainants herein have not shown that they were damaged. It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation. The shipper who has been charged an unlawful rate and who is the owner of goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business."

In *Michigan Hardwood Mfrs. Assn. v. Freight Bureau*, 27 I. C. C. 32, 39 (decided May 6, 1913), the Interstate Commerce Commission said:

"The defendants urge that, inasmuch as the complainants increased the price of their lumber by the amount of the increase in the transportation charge, they have suffered no damage."

"With respect to the practical aspect of this claim it may be said:

"There is no fixed mill price for this lumber, nor does the manufacturer always obtain the price which he quotes. While, therefore, these complainants may have attempted to increase their price upon the Pacific Coast by the amount of the advance in the freight rate, it is by no means certain that they obtained in all cases, nor

in any case, the full price at the mill which they otherwise would. While it may be that some portion of this advance was in most instances added to the price obtained for the lumber, it is probable that the full amount of the advance was seldom recouped. It must be evident that where there is no established price at the mill it would be impossible to determine the amount of damage to which the complainants would be entitled upon this basis.

“The profit which a lumber manufacturer makes depends not only upon his profit per 1,000 feet, but also upon the number of thousand feet which he sells. The hardwood lumber which is consumed upon the Pacific Coast is brought in from foreign countries as well as from the east. An advance of \$4 per 1,000 feet would certainly tend to limit the sales of the eastern producer as compared with his foreign competitor. Assuming, therefore, that an advance equal to the increase in the freight rate was charged, the number of sales might have declined so that the total profit to the shipper was very much less than it otherwise would have been. *Evidently the complainants’ damages could not be assessed upon any such speculative basis.* * * * We find that these complainants have been compelled to pay a rate of 85 cents, that this rate ought not to have exceeded 80 cents *and that the complainants have been damaged by that amount which the defendants have unlawfully exacted from them.*”

There are 120 causes of action stated in the complaint. One hundred and two of these are on behalf of the owners of the goods transported. The other eighteen (viz. Nos. 58 to 65, inclusive, 68 to 74, inclusive, and 86, 87 and 88) are on behalf on shippers who paid the unlawful charges. In these eighteen causes of action it is not alleged that the assignors of

plaintiff were the owners of the goods transported. As to these eighteen causes of action, therefore, the complaint may not allege facts sufficient to state a cause of action under the statute. As to the other 102 causes of action, however, facts are alleged which show that plaintiff's assignors were the owners of the property transported. In these causes of action it is alleged that plaintiff's assignors were the consignors of the property, which is equivalent to an allegation of ownership, as *the consignee is presumed to be the owner of the property transported.*

Fitzhugh v. Wiman, 9 N. Y. 559.

Hardy v. Monroe, 127 Mass. 64.

Cleveland, etc., Ry. Co. v. Moline Plow Co., 41 N. E. 480 (Ind.).

Pennsylvania, etc., Co. v. Poor, 3 N. E. 253 (Ind.).

Hutchinson on Carriers (3rd ed.), Secs. 1320, 1315, 735, 1304, 1317.

Plaintiff in error contends (page 92) that not only is there an "absence of any statutory theory" for the recovery of the damages resulting from the overcharge, but that the railroad statutes "have effectively foreclosed any claim that may be made by the defendant in error that it is relying upon the common law liability or a common law right of action."

It is very clear that the statutory provisions quoted above conferring a right of action upon the person damaged by a violation of the provisions of the act did not abrogate any common law right of action which existed independent of the statutes. As pointed out in *Texas & Pacific v. Abilene Oil Co.*,

204 U. S. 526, and *Robinson v. B. & O. R. R. Co.*, 222 U. S. 506, the only common law rights which were abrogated by the Interstate Commerce Act were such rights whose continued existence was inconsistent with the provisions of the Statute. At common law a shipper who paid an unreasonably high charge was entitled to maintain an action at law to recover the excess over a reasonable charge. In the above mentioned cases it was contended that such common law right still existed notwithstanding Congress had created a tribunal for the very purpose of determining whether a given rate was reasonable or not. The Supreme Court held that this common law right was abrogated by the provisions of the statute, but expressly recognized the existence of all prior common law rights not necessarily inconsistent with the statute.

At common law, a person who paid an unlawful charge to secure the transportation of property was entitled to recover the excess over a ^{lawful} reasonable charge. It was immaterial whether or not he was the owner of the property transported. This common law right is entirely consistent with our railroad statutes. In the case of *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, *supra*, the Supreme Court said:

“The English courts make a clear distinction between overcharges and damages, *and the same is true under the Commerce Act*. For if the plaintiff here had been required to pay more than the tariff rate it could have recovered the excess, not as damages but as an overcharge, and while one count of the complaint asserted a claim of this nature, the proof did not justify a verdict thereon, for the plaintiff admitted it had only paid the lawful rates named in the tariff.”

Of course it is clear that the charging of more than the lawful rate entitles the owner of property who pays the same to damages under Section 8 of the Interstate Commerce Act and the corresponding sections of our statutes. Such person has a common law right and (if he is the owner of the property transported) also a right of action for damages under the statute.

Like the Interstate Commerce Act, neither the Statutes of 1909, 1911, nor the Public Utilities Act abrogate any common law right whose continued existence is not repugnant to the provisions of the statutes.

Moreover, as the Constitution fixed as the charge for the shorter haul the lesser charge made for the longer haul, and as it results from such provision of the Constitution that a shipper who was required to pay more has the right to recover the excess over the lawful charge, it would have been beyond the power of the Legislature to abrogate such right. It is clear that the Legislature has no power to take away or impair a right expressly or impliedly given by the Constitution.

As such right necessarily resulted from the Constitutional provision, the Legislature would not have had the power to impair it or to change the construction of the Constitution. It undoubtedly had the power to add other rights, but not to impair those resulting from the construction of the organic law.

4. THAT IT IS WHOLLY IMMATERIAL WHETHER FORMAL PROTEST WAS MADE AT THE TIME OF THE PAYMENT OF THE ILLEGAL CHARGES.

Plaintiff in error contends that the Court erred in over-ruling the demurrer to the tenth separate defense, which alleged that the assignors of defendant in error paid the charges complained of without protest.

There are three answers to this contention. These are:

(a) *That a formal protest was wholly unnecessary as at common law charges paid by the consignor in order to secure the transportation of property or by the consignee in order to obtain possession of property transported are not voluntarily paid.*

(b) *The common law rule that payments made to a common carrier should be involuntary in order to entitle the person paying the same to recover is wholly inconsistent with the provisions of the Statute of 1909, the Statute of 1911, and the Public Utilities Act prohibiting discrimination and preferences of all kinds.*

(c) *That this is a statutory action brought in pursuance of the provisions of the Statute of 1909, the Statute of 1911, and the Public Utilities Act, and it is wholly immaterial, therefore, whether the payments were voluntarily made or not.*

(a) **That a formal protest was wholly unnecessary as at common law charges paid by the consignor in order to secure the transportation of property or by the consignee in order**

**to obtain the possession of property transported
are not voluntarily paid.**

In support of the contention that a formal protest was necessary, plaintiff in error cites *Brumagin v. Tillinghast*, 18 Cal. 269, and *Killmer v. N. Y. C. R. R. Co.*, 100 N. Y. 395.

In 102 of the causes of action stated in the complaint, it is alleged (Paragraph IV), "that in order to obtain the possession and delivery of said property so transported by said defendant, and at the time of the delivery of said property to plaintiff's assignor said plaintiff's assignor was compelled to pay the said charges demanded by defendant." By Paragraph II of the Answer (Record p. 334) it is admitted that defendant "*would not have delivered said property to plaintiff's assignors if said charges demanded by defendant had not been paid.*" In these 102 causes of action the assignors of defendant in error were consignees of the property transported. In eighteen of the 120 causes of action it is stated in the complaint and admitted by the answer that defendant would not have transported the property if the charges demanded had not been paid (Answer Paragraph IV, Record p. 335). In these eighteen causes of action plaintiff's assignors were consignors.

In *Heiserman v. Burlington, etc., Ry. Co.*, 18 N. W. 903 (Iowa), which was an action against a railroad company to recover excessive charges, the Supreme Court of Iowa said:

"Nor need the plaintiff, in a case brought to enforce such an obligation show objection or protest prior to the payment in excess of reasonable compensation. These rules are founded upon the consideration that railroad companies are public

carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges the whole business of the country would be subject to unjust exactions resulting in oppression to citizens and destructive to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reasons they would be vain, being addressed to those who occupy the commanding position of power to endorse obedience to their requirements. For another reason they are not required. Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names or where to find them. Their places of business are usually in cities distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officials, delays would follow, resulting in loss, and, in case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest where they would be unavailing and vain. The doctrines we have expressed are supported by the following authorities: *Chicago and A. Ry. Co. v. Coal Co.*, 79 Ill. 121; *Mobile & M. Ry.*

Co. v. Steiner, 61 Ala. 559; *Parker v. G. W. Ry. Co.*, 7 Man. & G. 253; *Harmony v. Bingham*, 12 N. Y. 99; *Chandler v. Sanger*, 114 Mass. 364; *Stephan v. Daniels*, 27 Ohio 527; *Robinson v. Ezzell*, 72 N. C. 231; *Carew v. Rutherford*, 106 Mass. 1; *Lafayette & I. Ry. Co. v. Pattison*, 41 Ind. 312; *Philanthropic Building Ass'n v. McKnight*, 35 P. St. 470; *Wood v. Lake*, 13 Wis. 84; *Wheaton v. Hibbard*, 20 Johns 290; *Thomas v. Shoemaker*, 6 Watts & S. 179; *Palmer v. Lord*, 6 Johns Ch. 95; *State Bank v. Ensminger*, 7 Blackf. 105."

In the above case no protest was made and the carrier averred that plaintiff "knowingly, voluntarily and willingly" paid the charges.

Mobile v. Steiner, 61 Ala. 571, was an action in principle identical with the case at bar. The Statute of Alabama provided that a railroad should not charge for an intermediate haul charges exceeding by more than 50 per cent the charge for the long haul. In holding that a person who made payments exceeding by more than 50 per cent the charge for the long haul was entitled to recover the excess, the Supreme Court of Alabama said:

"We have shown above that any demand and payment of charges for transportation of local freight, above fifty per cent increase on the rate of the same description of freight over the whole line of the railroad, is excessive and illegal. It is in positive disregard and violation of the mandate of the law. It is contended for appellant, first, that inasmuch as the statute has declared the rate of tolls, and has given a penalty for its violation, this remedy is exclusive, and none other can be resorted to. Second, that the payments were voluntarily made, and therefore can not be recovered back. We do not think there is

anything in either of these objections. In regard to the first, any violation of a statute or disregard of a statutory duty by which another suffers a pecuniary loss, gives to the injured party a right of action for damages sustained. *Satterfield, Ex'r of Grey v. Mobile Trade Co.*, 55 Ala. 387 (28 Am. Rep. 729). And where the wrong consists in the unauthorized demand of money and its payment under such unauthorized demand, this is money had and received by the demandant for the use and benefit of the payer, unless the case falls within the principle of money voluntarily paid; and a count for money had and received is sufficient for its recovery. The second objection. Railroads have so expedited and cheapened travel and transportation; have so driven from their domain all competing modes of transportation, that the public is left no discretion but to employ them, or suffer irreparable injury in this age of steam and electricity. They have established rates of charges, and these the shipper must pay, or forego their facilities and benefits. *To object or protest would be an idle waste of words. The law looks to the substance of things and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service, is not voluntarily paid, as the law interprets that phrase.* In the case of the Chicago and Alton Railroad Co. v. the C. V. & W. Coal Co., 79 Ill. 121, the Court in reply to the objections that the money was voluntarily paid, said: 'It can hardly be said these enhanced charges were voluntarily paid by the appellees. It was a case of life or death with them, as they had no other means of conveying their coals to the markets offered by the Illinois Central, and were bound to accede to any terms appellants might impose. They were under a sort of moral duress, by submitting to which appellants have received money from them which in equity and

good conscience they ought not to retain.' The case of *Parker v. G. Wes. R. R. Co.*, 7 Man. & Gr. 253, as a suit by a shipper to recover back excessive charges paid the railroad. It was objected that the payment was voluntary. The Court, C. J. Tindall, said: 'We are of opinion that the payments were not voluntary. They were made in order to induce the company to do that which they were bound to do without them; and for the refusal to do which an action on the case might have been maintained.' The case was assumpsit for money had and received, and the Court ruled that the action was well brought. To the same effect are the following authorities: 2 *Greenl. Ev.* Sec. 121; *Colwell v. Peden*, 3 Watts 327; *Harmony v. Bingham*, 12 N. Y. 99 (62 Am. Rep. 142); *Bos. & S. Glass Co. v. City of Boston*, 4 Metc. 181; *Chandler v. Sanger*, 114 Mass. 364 (19 Am. Rep. 367); *Stephan v. Daniels*, 27 Ohio St. 527; *Tuttle v. Everett*, 51 Miss 27 (Am. Rep. 622); *Howe v. State*, 53 Miss. 57; *Robinson v. Ezzell*, 72 N. C. 231; *First National Bank v. Watkins*, 21 Mich. 483; *Atwell v. Zeluff*, 26 Mich. 188; *McKee v. Campbell*, 27 Mich. 497; *Carew v. Rutherford*, 106 Mass. 1 (18 Am. Rep. 287); *L. & I. Railroad Co. v. Pattison*, 41 Ind. 312."

Quotations from other decisions to the same general effect as the above could be multiplied, but that is unnecessary.

The case of *Killmer v. R. R.*, 100 N. Y. 395, cited by plaintiff in error stands practically alone and is contrary to the great weight of authority.

Moreover, the *Killmer* case involved the payment of tariff charges which the plaintiff claimed were unlawful because unreasonably high. Prima facie at least they were lawful. Here, however, the charges paid were in violation of a plain constitutional provision.

In *Hardaway v. So. Ry.*, 73 S. E. 1020 (S. C.), cited by defendant, the payments were not made before the goods were delivered.

The case of *Hanford Gas & Power Co. v. Hanford*, 163 Cal. 108, did not involve the payment of freight charges to a common carrier and can have no application to the case at bar.

Plaintiff in error states that "it does not appear that the assignors of defendant in error had any interest whatever in the goods on which the freightage was demanded."

In 102 out of the 120 causes of action the assignors of defendant in error were the consignees of the property transported and are *presumed to be the owners thereof*. The authorities to this effect are cited under the preceding head of this brief at page 81. As to such of the assignors of defendant in error who were consignors, the allegations of the complaint show that they were in possession of the property and that they delivered it to plaintiff in error for transportation. Plaintiff in error was under the legal obligation to transport such property at the lawful rate and if plaintiff's assignors were required to have any "interest" in the property in order to recover the excessive charge it may be said that their possession constituted a sufficient interest. It has never been held by any court, however, that it was incumbent upon such person to allege or prove that he had an interest in the property transported.

(b) The common law rule that payments made to a common carrier should be involuntary in order to entitle the person paying the same to recover is wholly inconsistent with the

provisions of the Statute of 1909, the Statute of 1911 and the Public Utilities Act prohibiting discrimination and preferences of all kinds.

The Interstate Commerce Commission has held that the Interstate Commerce Act (which for all practical purposes is identical with our statutes) abrogated the common law requirement that a payment of unlawful freight to a carrier should be compulsory in order to entitle the person making the payment to recover.

The Supreme Court of the United States in many cases, and particularly in the case of *A. J. Phillips Co. v. G. T. W. Co.*, 35 U. S. Sup. Ct. Rep. 444 (advance sheets), has so construed the Interstate Commerce Act as to leave no doubt that when and if the question comes before that court for decision it will hold that unlawful payments, whether voluntary or involuntary, may be recovered.

Before quoting from these decisions, we shall quote the sections of the Interstate Commerce Act bearing upon this matter. Section 2 of the act is as follows:

“Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and

conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.”

Section 3 (in part) is as follows:

“Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

The foregoing are the provisions of the Interstate Commerce Act prohibiting discrimination or favoritism by any device whatsoever. As we shall hereafter see our statutes contain almost identical provisions.

In *Baer Bros. v. M. P. Ry. Co.*, 13 I. C. C. Rep. 339, which was an application to the Interstate Commerce Commission to recover damages for the exaction of an unreasonably high rate, the Commission, with reference to the claim that the payments were made without protest, said:

“The Supreme Court of the United States has held that the reasonableness of railway charges where the question of reparation is involved must be first passed upon by this Commission, and this decision rests largely upon the ground that in no other way can the Act to regulate commerce be applied as to prevent confusion and

gross discrimination between shippers. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426. *If it should be finally determined that a protest must be made at the time of payment of the freight money in each case, the result would be the grossest discrimination. A shipper paying under protest without the knowledge of other shippers might thus obtain the right to recover these charges while all other persons were debarred from that privilege during the period covered by the protest."*

In *So. Pine Lbr. Co. v. So. Ry. Co.*, 14 I. C. C. Rep. 197, the Commission in overruling the contention that the claimant was not entitled to recover for the reason that no protest was made said:

"It is also manifest that to sustain this contention would be to open the way to the grossest discriminations, to prevent which is one of the leading purposes of the Act to Regulate Commerce."

Both of these cases were proceedings before the Commission to recover excessive charges, the complaints maintaining that the charges were unlawful because unreasonably high.

Under Section 9 of the Act, a person who is required to pay unlawful rates must elect whether he will proceed before the Commission or in the courts.

But it is most apparent that the reasoning of the Commission applies equally to all unlawful charges exacted by a carrier and that the same discrimination would result whether the charges sought to be recovered were contrary to the provision of the Act requir-

ing all charges to be reasonable or contrary to the long and short haul clause contained in Section 4 of the Act, or contrary to the prohibition against charging more than the tariff rate.

The Act could not possibly be construed to mean that a shipper who voluntarily paid an unreasonable charge had the same right of recovery as one who paid it under compulsion, but that a shipper who voluntarily paid charges in excess of the tariff rate could not recover while his neighbor who paid under protest (or as a condition to receiving his goods) could recover. The gross discrimination referred to by the Interstate Commerce Commission would exist equally in both cases.

Although the Commission did not expressly hold that it was immaterial whether the payment was voluntary or not such must be the effect of its decisions. The only purpose of a protest (in cases where it is required) is to rebut the presumption that the payment was voluntary. In effect, therefore, the Commission held that it was immaterial whether the payment was voluntary or involuntary as to deny a recovery in the one case and to permit it in the other would result in gross discrimination.

The Interstate Commerce Commission did not in replying to the contention of the carrier that the payments were made without protest make the same answer that the courts have made in similar cases, viz.: "A protest is unnecessary as it would have been idle and the payment was involuntary nevertheless" but they replied (having in view the provisions of the Act prohibiting discrimination and preferences of all kinds) in effect as follows: "To hold a payment of unlawful charges not recoverable

because voluntarily made and one recoverable because involuntary would result in gross discrimination, hence all payments made contrary to provisions of the Act are recoverable whether voluntary or involuntary.”

In the very late case of *A. J. Phillips Co. v. G. T. W. Co.*, 35 U. S. Sup. Ct. Rep. 444 (advance sheets) *supra*, the Supreme Court held that a carrier could not waive the statute of limitations in favor of one shipper and plead it against another. In so holding, the Supreme Court said:

“Under such a statute (the court refers to the statute of limitations contained in Sec. 16 of the Interstate Commerce Act) the lapse of time not only bars the remedy, but destroys the liability (*Finn v. United States*, 123 U. S. 227, 232, 31 L. ed. 128, 130, 8 Sup. Ct. Rep. 82), whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. *This will more distinctly appear by considering the requirements of uniformity which, in this, as in so many other instances, must be borne in mind in construing the commerce act.* The obligation of the carrier to adhere to the legal rate, to refund only what is permitted by law, and to treat all shippers alike, would have made it illegal for the carriers, either by silence or by express waiver, to preserve to the Phillips Company a rate of action which the statute required should be asserted within a fixed period. To have one period of limitation where the complaint is filed before the Commission, and the varying periods of limitation of the different states, where a suit was brought in a court of competent jurisdiction; or to permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of

the terms of the commerce act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier. The railroad company therefore was bound to claim the benefit of the statute here, and could do so here by general demurrer."

If our statutes permitted a carrier to plead that a payment of unlawful freight charges was made after the goods were delivered and was therefore voluntary a carrier would be in a position to plead such defense as against one shipper who paid an unlawful charge and to fail to plead it as against another who paid such a charge thereby destroying the equality of treatment which the statutes require in precisely the manner described by the United States Supreme Court in the *Phillips Case*. *This decision holds that the obligation to charge and receive the lawful rate is a mutual one which neither the carrier nor the shipper can avoid and that the carrier will not be permitted to refund to one shipper and refuse to refund to another.* It is wholly immaterial by what device the discrimination is practiced. If one shipper through alertness saw to it that his payments were "involuntary" and was permitted to recover, while another who was negligent and made the payment "voluntarily" (as for example by taking delivery the day before the payment was made) was denied the right to recover it is clear that one of the cardinal purposes of the Act would be subverted.

That common law rules and rights which are inconsistent with the Interstate Commerce Act are im-

pliedly abrogated thereby was held by the United States Supreme Court in the case of *Texas & P. Ry. Co. v. Abilene Oil Co.*, 204 U. S. 426, 436. In that case the plaintiff insisted that the common law right to recover by action at law the excess over a reasonable charge was not abrogated by the Interstate Commerce Act. In holding to the contrary the Supreme Court, after referring to the principle that at common law such right existed, said (pg. 436):

“As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not in so many words abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and indeed that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, *unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.*”

Further the Supreme Court said (pg. 441):

“Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, *would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready*

means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

So in the case of *Robinson v. B. & O. R. R. Co.*, 222 U. S. 506, 510, the Supreme Court in deciding a case involving the same question decided in *Texas & Pacific Ry. Co. v. Abilene Oil Co.*, *supra*, said:

"And this is so, because the existence and exercise of a right to maintain an action of that character (the common law action to recover the excess over a reasonable charge, in the absence of such an investigation and order, would be repugnant to the declared rule that a rate established in the mode prescribed should be deemed the legal rate and obligatory alike upon carrier and shipper until changed in the manner provided, would be in derogation of the power expressly delegated to the Commission, and would be destructive of the uniformity and equality which the Act was designed to secure."

As we have already seen the causes of action in the complaint herein accrued under three different acts of the legislature. The earliest ones accrued under the Act of 1909 (Stats. 1909:499), the later ones under the Act of 1911 (Stats. 1911:13) and the latest under the Public Utilities Act (Extra Session 1911: 18). *All of these acts insofar as they relate to the prohibition of discrimination and preferences contain provisions practically identical with the Interstate Commerce Act.*

These provisions of the statutes of 1909 and 1911 are quoted at pages 59 et seq. of this brief. The provisions of the Public Utilities Act corresponding to the provisions of the Interstate Commerce Act are contained in Sections 19 and 32.

Discrimination is also forbidden by Section 21 of Article XII of the Constitution. The general prohibition against discrimination is the same in the Section as amended October 10, 1911, as it was before such amendment.

It is very apparent that the common law rule that a payment voluntarily made could not be recovered can have no application to the payment of unlawful freight charges, as the continued existence of such rule is wholly inconsistent with the provisions of our railroad statutes enacted to prevent discrimination and preferences and to secure equality of treatment to all persons transporting property.

(c) That this is a statutory action brought in pursuance of the provisions of the Statute of 1909, the Statute of 1911 and the Public Utilities Act, and it is wholly immaterial, therefore, whether the payments were voluntarily made or not.

The statutory provisions authorizing the prosecution of this action are referred to and quoted under the preceding head of this brief at pages 62 et seq. The entire argument appearing at pages 57 to 83, *supra*, is applicable to the matter discussed under this subdivision. Unquestionably as far as 102 of the causes of action are concerned this is an action for damages under the statutes. In 102 of the causes of action facts are alleged which show that plaintiff's assignors were the owners of the property transported.

This action is authorized by Section 38 of the Act of 1909 (Stats. 1909:499) by Section 43 of the Act of 1911 (Stats. 1911:13) and by Section 73 (a) of the Public Utilities Act (Extra Session 1911:18).

As shown under the preceding head of this brief the Acts of 1909 and 1911 prohibit discrimination and confer a right of action upon any person damaged by discrimination. We have also seen that the charging of more for the shorter than for the longer distance is a species of discrimination expressly forbidden by the Constitution, and that the provisions of these Acts prohibiting discrimination or preferences, as between persons and places, must be construed to prohibit what the Constitution forbids. We have also seen that the Public Utilities Act (Sec. 73 (a)) expressly confers a right of action for the violation of the Constitution. It also appears that the plaintiff in error has violated the provisions of the Acts of 1909 and 1911 prohibiting the charging of more than the tariff rate. This because the lower rate to the more distant point published in the tariffs of plaintiff in error became the maximum legal tariff rate to the intermediate points. The conclusion is irresistible that the complaint states a cause of action for damages under the statutes and that the measure of the damages is conclusively fixed.

The remedy given by the statutes being a special statutory one, it is wholly immaterial whether the payments were voluntarily made or not, as the statutory liability exists in every case where excessive or discriminatory charges are collected.

In *Penn. R. R. Co. v. International Coal Mining Co.*, 173 Fed. 1, 7, the railroad contended that with the knowledge that other shippers were obtaining a lower rate for the same service, plaintiff nevertheless paid the freight without protest. In holding that it was immaterial whether the payment was voluntary or involuntary, the Circuit Court of Appeals said:

“It is now claimed that the absence of protest accompanying payment of freight is fatal to the right of action. We are of opinion such is not the case. *This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful.* Thus Section 2 provides:

‘Such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.’

—and *creates a statutory right to recover, not of the freight paid, but of damages, viz.:*

‘Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act.’

From this it is clear that, Congress having conferred a statutory right of action, and having imposed a liability to action by Section 8 on the carrier, who shall *‘do, or cause to be done, or permit to be done any act, matter or thing in this act prohibited or declared to be unlawful,’* and we may add, *having conferred such right of action without imposing the precedent condition of protest,* it follows that the courts cannot by construction impose on the statutory right a condition which Congress has not imposed. It follows, therefore, that this assignment cannot be sustained. This is in harmony with the holding of the Supreme Court in *United States v. Bank of Washington*, 6 Pet. 17, 8 L. Ed. 299, where it was said:

‘Where money is wrongfully and illegally exacted, it is received without any legal right or authority to receive it; and the law, at the very time of payment, creates the obligation

to refund it. A notice of intention to recover back the money does not, even in such cases, create the right to recover it back. That results from the illegal exaction of it; and the notice may serve to rebut the inference that it was a voluntary payment or made through mistake.' "

The above case went to the United States Supreme Court. That court held that the Circuit Court of Appeals erred in certain particulars and sent the case back to the trial court for a new trial. However, the Supreme Court held by implication that the foregoing ruling of the Circuit Court of Appeals was correct. (*Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184).

The ruling of the Circuit Court of Appeals for the Third Circuit in *Penn. R. R. Co. v. International Coal Co.*, *supra*, was followed in *Mitchell Co. v. Penn. R. R. Co.*, 181 Fed. 403, 401.

5. THAT THE EVIDENCE SOUGHT TO BE INTRODUCED BY PLAINTIFF IN ERROR FAILS TO SHOW THAT THE RAILROAD COMMISSION RELIEVED PLAINTIFF IN ERROR FROM THE PROVISIONS OF SECTION 21 OF ARTICLE XII OF THE CONSTITUTION AGAINST CHARGING LESS FOR THE LONGER THAN FOR THE SHORTER HAUL.

This evidence was offered in support of the seventh special defense alleged in the answer. That defense was as follows (Record pg. 342):

“For a seventh further and separate defense, defendant states that as to each and all of the shipments referred to in plaintiff’s separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII, California Constitution, as amended October 10, 1911, authorized defendant, after investigation, to charge more for the shorter distance to the point intermediate San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction.”

This defense applied to the causes of action number 86 to 120, inclusive.

It is not contended by plaintiff in error that the evidence offered and rejected supports this defense but counsel for plaintiff in error seem to be under the impression that it was admissible nevertheless. The contention of plaintiff in error is stated at page 108 of its brief as follows:

“That the Commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually make a series of orders, some

of them preceding the filing of petitions for relief from the long and short haul clause and some of them afterwards, but all of them with the intention of preserving the status of the rates then being charged by plaintiff in error, until it could be determined by the Commission whether, and, if so to what extent, it was entitled to relief."

The first argument made under this head is that the reference to the Act of 1911 (Eshleman Act) in Section 22 of Article XII as amended October 10, 1911, in some unexplained way made legal the rates which plaintiff in error was charging on October 10, 1911, although such rates contravened the provisions of Section 21 of Article XII as it existed prior to and at the time of such amendment. The provisions of the amended Section 22 of Article XII referring to the Act of 1911 are as follows:

"The provisions of this section shall not be construed to repeal in whole or in part any existing law *not inconsistent herewith*, and the 'Railroad Commission Act' of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said Act shall be held and construed to be five commissioners."

Plaintiff in error refers to Section 15 of the Act of 1911 giving the Commission power to fix rates and

also to Section 18 of the Act to the effect that all rates established shall remain in effect until changed by the Commission. Referring further to the above quoted provision of Section 22 of Article XII plaintiff in error states:

“It was evidently the intention of the Section not to give the long and short haul clause therein contained an immedate and arbitrary operation without giving the carrier an opportunity to apply for relief.”

This argument is based upon the erroneous assumption that the Commission prior to October 10, 1911, had the power to establish rates which violated the express provisions of Section 21 of Article XII of the Constitution. This matter will be discussed under the next head of this brief and need not be further referred to here.

Even if such rates were legal prior to October 10th, 1911, they would become illegal immediately upon the adoption of the amendment of October 10th, 1911. There is nothing in the amendments to the Constitution then adopted, or in the Eshleman Act, referred to therein, which prevents such rates from becoming illegal immediately upon the adoption of the long and short haul prohibition of Section 21, as amended. Even if prior to October 10th, 1911, the Commission had the power to ignore the prohibition of the Constitution and to fix rates in contravention thereof, such rates became unlawful after October 10th, 1911.

We may assume, for the purpose of this argument, that prior to October 10th, 1911, there was no prohibition against charging more for the short than for the long haul. In such a case there could be no

question but that the carrier at and prior to the time of the amendment to Section 21, would have been legally entitled to charge more for the short haul. But immediately upon the adoption of the amendment of October 10th, 1911, such charge became unlawful. Section 21, as amended, provided for an application to the Commission for relief, *and until this application was granted the exaction of charges in contravention of the prohibition was unlawful.*

Section 21 of the Constitution, as amended October 10th, 1911, contained no *proviso* such as is contained in Section 4 of the Interstate Commerce Act, as amended June 18th, 1910. That *proviso* was deemed necessary by Congress in order to prevent the prohibition from applying at once.

The long and short haul provisions of Section 21 of Article XII were adopted from Section 4 of the Interstate Commerce Act as amended June 18, 1910, but in adopting them the people eliminated the *proviso* of Section 4 continuing existing rates in effect. This proviso of Section 4 which was not made a part of Section 21 of Article XII as amended is as follows:

“Provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section, prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.”

This *proviso* in Section 4 was deemed expedient in view of the fact that the carriers were at the time of

amendment lawfully charging more for the short than for the long haul. The intention was doubtless to allow time to readjust their charges so that there would be no sudden change in rates. If this *proviso* had not been contained in the section it is clear that the prohibition would be construed as taking effect at once, and that a violation would only be justified after relief had been granted by the Commission.

Even if a greater charge for the short than for the long haul had been legal at the time of the amendment to Section 21 on October 10, 1911, it is quite clear that the prohibition would have become absolute at once as it contains no *proviso* such as is contained in Section 4 of the Interstate Commerce Act.

But as a matter of fact at the time of the amendment of October 10th, 1911, such charges were then illegal. Even in a case where they were legal at the time of enactment of the prohibition Congress deemed it necessary to insert a *proviso* that they could be continued pending the decision of the Commission on application for relief; but *here they were already illegal and no such proviso was attached to the prohibition. Congress was about to prohibit the doing of an act which was then legal whereas the people of California in amending Section 21 intended to permit in the future and under certain conditions the doing of an act which theretofore had been illegal.* For many years before and at the time the amendment of October 10th, 1911 went into effect a greater charge for a short than for a long haul was illegal. Hence there was no occasion for a "temporary order of relief." The amendment to the Constitution granted on certain conditions a favor which prior to its enactment the carrier could not under any circumstances obtain. In the case of the amendment to Sec-

tion 4 of the Interstate Commerce Act a hardship might have been imposed if temporary relief were not granted, but here the carrier would be permitted to take advantage of its own wrong if a readjustment of its rates were necessary. It is clear that if the carrier had been obeying the law as it existed prior to October 10th, 1911, there would be no occasion for an "order for temporary relief."

Let us now consider the contention of plaintiff in error that the Court erred in sustaining the objections of defendant in error to the various orders of the Commission. The orders were offered in evidence in support of the seventh defense quoted above. That defense was based upon the proviso of Section 21 of Article XII, reading as follows:

"It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter haul being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

There is no question as to the meaning of this proviso. It required the carrier who desired to be relieved from the prohibition to file its application for relief and it required an investigation by the Commission and an order of relief in special cases. The provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise. (Section 22, Article I.)

The evidence offered by plaintiff in error conclusively shows that the Commission has never investigated the application of plaintiff in error. In fact, the applications themselves were not filed until December 30, 1911. We will take up seriatim the various orders of the Commission which plaintiff in error offered in evidence.

The first document offered in evidence was not an order but a notice, dated October 20th, 1911 (Record, page 481). As stated at page 117 of the brief of plaintiff in error, this notice recited the provisions of the amended Section 21 of the Constitution and directed carriers who had on file schedules violating such provisions to file, on or before January 2, 1912, "application or applications to be relieved from the provisions" of the amended Section 21, the form of the application being prescribed in the notice.

On November 20, 1911, the Commission made the following order (Record, page 404):

"To All Railroads and Other Transportation Companies Within the State of California.

"Permission is hereby granted to railroads and other transportation companies until January 2d, 1912, to file for establishment with the Commission in the manner prescribed by law and

in accordance with the Commission's regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

"The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2d, 1912."

As yet there was neither an application by the carrier nor an investigation by the Commission.

The next documents offered in evidence were the applications of plaintiff in error for relief which were in the form prescribed by the Commission (Record, page 407 *et seq.*). These applications were filed December 30, 1911. The Court sustained the objection to these applications upon the ground that they were irrelevant as the evidence failed to show that they had been granted in whole or in part.

The following admission was made by plaintiff in error with relation to these applications (Record, page 406):

"Mr. BOOTH.—These petitions may be con-

sidered to have been pending until May 27, 1912. They had not been specifically acted upon either prior to that time or since that time, except in so far as the decision in Case 116, which I am going to offer shortly, may be considered to have affected them."

The next document offered in evidence was a certified copy of the minutes of a meeting the Railroad Commission held on January 2, 1912 (Record, page 423). This document was as follows:

"In the matter of Case No. 214 entitled 'In the matter of the provisions of Section 21 of Article 12 of the Constitution of California relating to long and short hauls and through rates exceeding aggregate of intermediate rates,' set for hearing at this time and place, the Commission proceeded to a hearing of the same. The following appearances were entered:

"G. J. Bradley of the Merchants and Manufacturers' Association of Sacramento.

"W. E. Wheeler and Seth Mann of the Traffic Bureau of the Merchants' Exchange.

"F. R. Hill of the Fresno Traffic Association.

"F. P. Gregson of the Associated Jobbers of Los Angeles.

"G. W. Luce and C. W. Durbrow of the Southern Pacific Company.

"Edward Chambers and H. P. Anewalt of the Atchison, Topeka & Santa Fe Railway.

"E. S. Pillsbury of Wells, Fargo & Company Express.

“Archibald Gray and C. H. Helting of the Western Pacific Railway.

“William Henshaw of the Southern California Cement Company.

“Discussion was held until 11:05 A. M.

“(See Reporter’s Transcript.)”

Regarding this meeting of the Commission, the following admission was made by plaintiff in error (Record, page 423):

“Mr. BOOTH.—That is a copy of the minutes of the Railroad Commission reciting that on January 2, 1912, Case 214 came on for hearing. *There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day.*”

The next document offered in evidence was an order of the Railroad Commission dated January 16, 1912 (Record, page 424). This order was as follows:

“It is hereby ordered that the time heretofore granted to the railroad and other transportation companies of the State within which to file with this Commission new schedules removing deviations from the provisions of Section 21 of Article XII of the Constitution of this State, or in case it is decided to justify the same, or any of them, applications to be relieved from the provisions of said section, be and the same is hereby extended to February 15, 1912, at which time said schedules or applications must be filed with this Commissioner. As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date,

the provisions of said Section 21, of Article XII, of the Constitution will at once become operative, and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included within the longer distance, and the aggregate of the intermediate rates or fares will become the through rate or fare in cases in which the through rate or fare is now in excess of the aggregate of the intermediate rates or fares.

“Until February 15, 1912, the railroad and other transportation companies may file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission’s regulations such changes in rates and fares as would occur in the (268-47) ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points: Provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the most distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line. *The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.*

“And be it further ordered that the Secretary be and he is hereby ordered to serve a copy of this order on each of said railroad and other transportation companies and to notify each of them to comply with all requirements hereof.

“Dated: January 16, 1912.”

The mere inspection of these orders of the Commission is sufficient to show that they were not made after investigation. The fact is that the Railroad Commission erroneously assumed that it had the power to permit carriers to violate the prohibition *pending investigation*. The Railroad Commission assumed in effect that they could add to the constitutional prohibition a proviso somewhat similar to that which Congress annexed to the prohibition of the Fourth Section of the Interstate Commerce Act by the Amendment of June 18, 1910, but which the people of California, for obvious reasons, did not adopt as a part of the amended Section 21.

Not only was there no investigation, but prior to December 30, 1911, there were no applications to investigate.

Plaintiff in error seeks to draw a distinction between the causes of action accruing prior and subsequent to January 16, 1912, the date of the order last quoted, *supra*. It is said:

“As to every claim of the defendant in error originating after January 16, 1912, the Commission had, after investigation, entered an order temporarily at least continuing the rates described in the application of December 30, 1911, in full force and effect.”

It is very clear, however, that there is no foundation for this alleged distinction. The order itself expressly negatives plaintiff in error's assumption that there had been any investigation. It provides:

“The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate to intermediate points, *all of which rates and fares will be subject to investigation and correction.*”

Moreover, it was expressly admitted by plaintiff in error that the applications filed on December 30, 1911, “may be considered to have been pending until May 27, 1912. They had not been specifically acted upon either prior to that time or since that time except in so far as the decision in Case No. 116 may be considered to have affected them.”

With respect to the meeting of the Commission held on January 2, 1912, it was admitted by plaintiff in error that “*There was a discussion held, but no evidence introduced, nothing further done; it was postponed without day.*”

It is apparently the contention of plaintiff in error that by its orders of November 20, 1911, and January 16, 1912, the Commission gave some sort of authority to plaintiff in error to charge the rates complained of in the complaint herein.

The order of November 20, 1911, purported to give carriers

“permission until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission's regulations, such changes in rates

and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided that in so doing the discrimination against intermediate points is not made greater than in existence October 10, 1911."

This order purported to permit the carriers to continue "under present rate bases or adjustments" higher rates to intermediate points provided that the discrimination against intermediate points was not greater than in existence on October 10, 1911. *But on October 10, 1911, there were no legal rates which discriminated against any intermediate points.* The order, therefore, was a nullity. Even if there had been applications for relief on file before it was made and even if the Commission had investigated such applications, the order could not under any possible view have amounted to an order of relief.

What the Commission had in mind in making an order of this kind can only be explained when we come to consider the opinion in the *Scott, Magner & Miller case*. In that case the Commission expressed the view that prior to October 10, 1911, it had the power to establish rates which contravened the provisions of Section 21 of Article XII. The decision of the Commission in that case will be further considered under the next head of this brief, when the contention of plaintiff in error that the Railroad Commission could establish rates which contravened the constitutional provision will be replied to.

The order of January 16, 1912, contained the same provision as that contained in the order of November 20, 1912, above quoted (Record, page 426). It was

equally a nullity. Prior to its date the plaintiff in error had filed applications for relief; but even if (which is not the fact) the Commission had investigated these applications, the order of January 16, 1912, could not have amounted to an order granting them in whole or in part. It made no reference to the applications on file nor to the deviations specified therein. It merely purported to allow all carriers to discriminate against intermediate points to the extent that such discrimination existed on October 10, 1911. As no discrimination existed on that date the order, viewed as an order attempting to grant relief, would have been void on its face.

Plaintiff in error contends that the order of January 16, 1911, was made after "investigation." As we have already seen, however, the order on its face expressly states that the investigation is to be in the future. We need not reply to the argument of plaintiff in error that the Commission could investigate those applications "*ex parte*, and from its own records supplemented by its general knowledge of the California situation."

If the order of January 16, 1912, had in terms granted the applications on file, either in whole or in part, it might be presumed that an investigation had been made. But the order makes no mention of the applications of plaintiff in error. It merely contains a general order purporting to permit the continuance of the discrimination "in existence on October 10, 1911," and expressly states that the Commission "does not indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate

to intermediate points, all of which rates and fares *will be subject to investigation and correction.*"

The order does not purport to be any different from the order of November 20, 1911, which was made before any applications were filed. The order of November 20th stated that "rates and fares will be investigated at the hearing to be held on January 2, 1912." No evidence was introduced at this hearing, and the matter was adjourned *sine die*. The order of January 16, 1912, did not state at what time the future investigation referred to would be held.

Plaintiff in error suggests that on November 20, 1911, the Commission had the power to fix rates, pending investigation, though such rates did not conform to the long and short haul clause. It is said that "by its chain of orders offered by plaintiff in error" the Commission "did establish the rates which were being charged by the carriers on October 10, 1911, as the rules which should govern such carriers who choose to file their applications until their application could be finally determined and passed upon."

This contention is based upon the provision of Section 22 of Article XII as amended October 10, 1911, to the effect that no existing law "not inconsistent herewith" should be repealed, and that the Act of 1911 should have the same force and effect as if it had been passed after the adoption of the amendments to the Constitution.

Before replying to the contention that this provision of Section 22 authorized the Commission to establish rates violative of the long and short haul clause of Section 21 without the application and investigation therein provided for, let us first see if the

Commission attempted so to do by its orders of November 20, 1911, and January 16, 1912.

The most cursory inspection of these orders is sufficient to show that they do not purport to establish any rates. The order of November 20, 1911, purports to grant "Permission to railroads and other transportation companies until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law, such changes in rates and fares as would occur in the ordinary course of business, continuing under the present bases or adjustments, higher rates or fares at intermediate points." The order concludes with the statement that the Commission does not indicate that it will finally approve any rates or fares filed under this permission, all of which will be subject to the investigation to be held on January 2, 1912.

The order of January 16, 1912, is the same in this respect as the order of November 20, 1911.

It is very apparent that these orders did not purport to establish any rates.

We will now reply to the contention that the Commission could establish rates violative of the long and short haul clause of Section 21 of Article XII without the application or investigation provided for in the section.

In support of this contention plaintiff in error quotes the following provision of Section 22 of Article XII as amended:

"No provision of this Constitution shall be construed as a limitation of the authority of the Legislature to confer upon the Railroad Com-

mission additional powers of the same kind, or different, from those conferred herein *which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution*, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.”

Under this provision plaintiff in error contends that the Legislature might confer upon the Commission the power to establish rates violative of the long and short haul provision of Section 21 without the application or investigation prescribed by that section and necessarily not in the “special cases” referred to in Section 21.

But it is plain that such a statute would be wholly inconsistent with the powers conferred upon the Commission by the long and short haul clause of Section 21. *Such a statute would practically supersede or repeal the long and short haul clause of the Constitution.* Although the Legislature may confer upon the Commission powers in addition to those conferred by the Constitution, yet such powers must not be inconsistent with the powers conferred by the Constitution. The Constitution contains the law relating to long and short hauls and confers upon the Commission certain powers in relation thereto. The manner in which relief from the prohibition can be obtained is specifically pointed out. *It necessarily follows that a statute providing that relief may be obtained in a different manner would be inconsistent with the Constitution.*

All that was decided by the Supreme Court in *Pacific S. T. & T. Co. v. Eshleman*, 166 Cal. 660, was

that the above quoted provision of Section 22 authorized the Legislature to confer upon the Commission such powers as it may seem fit "even to the destruction of the safeguards, privileges and immunities guaranteed by the Constitution to all other kinds of property and its owners." The Supreme Court held that an act of the Legislature conferring powers upon the Commission was "supreme over all constitutional provisions." In using the language quoted above the Supreme Court of California was replying to the contention of the Telephone Company that the Public Utilities Act in conferring upon the Commission the power to require a telephone company to permit a physical connection between its lines and the lines of a competing company violated the provisions of the State Constitution against the taking of private property for a public purpose without first making compensation. The Supreme Court held that the Legislature in conferring power upon the Commission was not bound by this constitutional provision. But the Court expressly stated that *the Legislature had no power to confer upon the Commission any power inconsistent with the provisions of the Constitution relating to the Railroad Commission*. The Supreme Court held:

"If the Railroad Commission had acted in conformity with the powers granted to it by the Legislature, the validity of the order cannot be questioned in the Supreme Court or elsewhere under a claim of violation of any provision of the State Constitution *other than the provisions relating to the Railroad Commission*.

In this connection, as we have seen, the plaintiff in error again reverts to the Eshleman Act (the Act of 1911) which, as provided by Section 22 of Article

XII, had the same force as if enacted after the amendment to the Constitution. Referring to the Eshleman Act, plaintiff in error states:

“It is apparent that the Legislature by it intended to confer upon the Railroad Commission the broadest and most untrammelled power with respect to the fixing of rates.”

But why, it may be asked, is it necessary to go to the Eshleman Act to sustain the power of the Commission to fix rates? Section 22, Article XII, of the Constitution itself is just as broad as the Eshleman Act, as that section confers upon the Commission the “power to establish rates and charges for the transportation of passengers and freight by railroads and other transportation companies.”

Why did not plaintiff in error simplify its argument by contending that the power conferred upon the Commission by Section 22 to fix rates authorizes the Commission to fix rates violative of the long and short haul provision of Section 21 without either the application or investigation required by the last mentioned section?

The reason why the contention was not made in this form is apparent. The contention if made in this form would refute itself, and, furthermore, in view of the provision of Section 22 quoted above, to the effect “no provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers * * * which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution,” it was probably deemed advisable to base the power of the Commission to fix

rates upon an act of the Legislature rather than upon the Constitution itself.

In view of the terms of the orders of November 20, 1911, and January 16, 1912, and in view also of the admissions that the applications filed on December 30, 1911, were never acted on and were still pending at the time of the trial, and that at the hearing held on January 2, 1912, no evidence was introduced and nothing was done, the meeting adjourning without day, it is hardly conceivable that plaintiff in error is serious in its contention that the evidence offered supported its seventh separate defense.

6. THE RAILROAD COMMISSION HAS NO POWER TO ESTABLISH RATES CONTRAVENING THE CONSTITUTIONAL PROVISION, AND IF IT ASSUMED TO DO SO ITS ACT WAS VOID.

The position of the plaintiff in error is that the Railroad Commission "established" the rate collected, that it thereupon became "conclusively just and reasonable," and it was legally entitled to charge accordingly. The answer to this contention is that the act of the Commission in attempting to establish such act and the rate itself were unconstitutional.

The provisions of the long and short haul clause of Section 21 of the Constitution of 1879 and the provisions of Section 22 thereof do not conflict. The provisions of both sections can be given full effect by holding *that neither a carrier nor the Commission can violate the positive prohibition of the Constitution—that the Commission can not establish a higher rate for the short than for the longer haul—that all rates must conform to the requirements of the long and short haul provision of Section 21.*

In reason how can it be said that the people intended that the Commission could make legal what a carrier itself was positively forbidden to do? The people said that no greater charge should be made for the short than for the longer haul. This prohibition did not specify the carrier but was against any such charge. If the carrier made such a rate it was illegal, and the Commission could have no power to legalize it by "establishing" it.

Let us assume that instead of containing the provision that it was the duty of the Commission to establish rates and the provision that the rates so established should be deemed conclusively just and

reasonable, the Constitution contained a provision that it was the duty of the *Legislature* to establish rates, and that the rates so established should be deemed conclusively just and reasonable.

If the Legislature had attempted to enact a statute which on its face ran counter to the provision of the Constitution by “establishing” a less rate for a longer haul, would not the statute fixing the long and short haul rates be held *unconstitutional* and not binding upon the carrier or any other person?

The courts have held in innumerable cases that an act of the Legislature attempting to override the Constitution is void. And yet the position of the Commission here is identical with that of the Legislature and it is bound by the same prohibition against establishing unconstitutional rates as the Legislature is against enacting an unconstitutional statute.

If the Constitution had omitted any provision that the Legislature or the Commission should establish rates, the Legislature would have had that power to the same extent as it is conferred upon the Commission by Section 22.

Let us assume that the Constitution contained only the long and short haul clause and that the Legislature in pursuance of its plenary power had established rates which contravened that section, *can it be doubted that the act prescribing such rates, in so far as it violated the inhibition of the Constitution, would be held unconstitutional and void?*

Section 22 of Article I of the Constitution reads as follows:

“The provisions of this Constitution are man-

datory and prohibitory, unless by express words they are declared to be otherwise.”

In *Matter of Maguire*, 57 Cal. 604, the Supreme Court considered the effect of Section 18 of Article XX of the Constitution, which reads as follows:

“No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.”

An ordinance of the City and County of San Francisco purported to make it unlawful and a misdemeanor for any female to wait on any person in any dance hall or bar-room. In holding the ordinance unconstitutional the Court, per Mr. Justice Thornton, said:

“It is said that this is nothing more than the exercise of the police power which is vested in the city and county by Section 11 of Article XI of the Constitution. *But is this provision in relation to the police power in the Constitution beyond the restriction of the section we have been examining?*

“*To arrive at the meaning of the Constitution, as of any other writing, the whole of it must be examined. If there is apparent conflict, it is the duty of the courts to harmonize them, if it can be reasonably done, so as to give effect to every portion of the instrument. It is not to be supposed that an instrument of this character, every section of which was fully considered, has been framed with contradictory provisions. What was provided in one section may be restrained by the provisions of another.*

“*The Section 18 of Article XX imposes a restraint on every law-making power in the State, whether an act of the Legislature, or an ordinance or by-law of a municipal corporation. It*

is a positive declaration, made by the sovereign authority, that whatever may be done under the legislative power, in any and every shape or form, shall never, by direct or indirect action, incapacitate any person on account of sex from entering upon or pursuing any lawful business, vocation, or profession. This power to make police regulations is as much restrained by the section just referred to as is the legislative power vested in the Senate and Assembly. Both grants of power are alike made by the Constitution, and both are alike restrained by this section of Article XX.

“It may be further said of it that it is prohibitory in its character, and needs no legislation to make it active in its effect. It is self-executing, and struck with nullity all acts in existence inconsistent with it as soon as the Constitution went into operation, and all since passed. (*McDonald v. Patterson*, 54 Cal. 245.)

“We have carefully weighed the arguments addressed to us on the point of immorality. But we must presume that all these considerations were discussed and weighed by the convention which framed the Constitution, and the people who adopted it; that they fully considered on the one hand the benefits which would spring from the adoption of a policy like that established by the section and the ban on the other; and that on a just and fair balancing of the resulting good and evil they determined to have the section as it is, as fixing and carrying out a policy, in their judgment, the best under the circumstances. *As we understand the section, it does establish, as the permanent and settled rule and policy of this State, that there shall be no legislation either directly or indirectly incapacitating or disabling a woman from entering on or pursuing any business, vocation, or profession permitted by law to be entered on and*

pursued by those sometimes designated as the stronger sex. To adopt the conclusion to which the reasoning of the counsel for the people would lead us would be, in our judgment, to insert an exception to the general rules prescribed by this section. But there are no exceptions in the section, and neither we nor any other power in the State have the right or authority to insert any, whether on the ground of immorality or any other ground. All these are considerations of policy, the determination of which belonged to the convention framing and the people adopting the Constitution; and their final and conclusive judgment has been expressed and entered in the clear and unmistakable language of the Constitution itself, declaring the rule as above stated. The policy of the ordinance is inconsistent with the policy intended and fixed by the Constitution. They cannot both stand.

“The Constitution furnishes a rule for its own construction. That rule is that its provisions are mandatory and prohibitory, unless by express words they are declared to be otherwise (Art. 1, Sec. 22). We find no such express words in the Constitution. *This rule is an admonition placed in this, the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, ‘we mean what we say’. Such is the declaration and command of the highest sovereignty among us, the people of the State, in regard to the subject under consideration.*”

So here the provision of Section 22 empowering the Commission to establish rates is not beyond the restraint of Section 21. Nor is it to be supposed that these provisions are contradictory, nor that what is “provided in one section may not be restrained by the provisions of another.” Equally

with Section 18 of Article I, Section 21 of Article XII “imposes a restraint on every law making power in the State and is a positive declaration made by the sovereign authority that whatever may be done under the legislative power (or by the Commission) *in any and every shape and form*, shall never by direct or indirect action” violate the positive prohibition of the Constitution. Equally with the ordinance under consideration, in *Matter of Maguire supra*, the so-called “established” rates are “inconsistent with the policy intended and fixed by the Constitution. They cannot both stand.”

In *Knight v. Martin*, 128 Cal. 245, the Supreme Court had under consideration the provisions of Section 5 of Article XI of the Constitution, providing for the election and compensation of county officers. This section provided that the Legislature

“shall regulate the compensation of all such officers in proportion to duties, and for this purpose *may* classify the counties by population.”

Subdivision 36 of Section 35 of the County Government Act of 1893 assumed to fix the compensation of assistant district attorneys at the sum of \$1,500 per annum throughout the State without regard to any classification of the counties for that purpose. In holding unconstitutional this section of the County Government Act the Supreme Court, after referring to the language of the Constitution printed above, quoted the following extract from the opinion of the Court in *Dwyer v. Parker*, 115 Cal. 544, where the same constitutional provision was involved:

“When this language is considered with that of Article 1, Section 22, of the same instrument, which declares that ‘the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise,’ the conviction is irresistible that the Constitution has prescribed a single mode which must be adopted and followed in fixing the compensation of officers, and that mode is to adjust the compensation in accordance with their respective duties under a classification of counties by population made for this purpose. To hold that the provision concerning classification of counties is permissive merely would be to deny to Section 22 of Article I its plain effect in a case calling for its application, and would likewise be to give to the language itself no possible force of efficacy. It was not necessary to confer upon the Legislature this power to classify, by way of permission. The Legislature would have had that power in any event, unless it had been expressly withheld; and the conclusion, therefore, may not be escaped that the mode designated by the Constitution is mandatory, and is the one and only method contemplated by the Constitution for fixing the compensation of the officers therein mentioned.”

In *McDonald v. Patterson*, 54 Cal. 247, the provisions of Section 19 of Article XI of the Constitution were under consideration by the Supreme Court. These provisions were as follows:

“No public work or improvement of any description whatsoever shall be done or made, in any city, in, upon or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made,

and an assessment, in proportion to benefits, on the property to be affected, or benefited, shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed."

Referring to the construction of the foregoing provisions, the Supreme Court said:

"In the construction of this Constitution, the rules expressed in Section 22, Article I, *must always be regarded*. That section declares that 'the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.'

"Now, in the light of this rule, laid down in words so clear and terms imperative, we will examine the sections above referred to.

"The language of Section 19 of Article II is both mandatory and prohibitory in its character. It is clear and unambiguous. It is difficult to see that it could have been made stronger in its words of command and prohibition. What words more vigorous or more appropriate to their manifest purpose could have been found in the whole compass of the English tongue we are at a loss to determine. It says, as plainly as words can disclose: 'We command that no such work as that referred to shall at any time be done, except as herein set down; and we prohibit any such work from being done at any time in any other way.' It is mandatory and prohibitory to every department of the Government, and every officer of each department. By its very terms it is binding upon all, and goes into effect as soon as the Constitution becomes the organic law, as it is strongly prohibitory. We could not hold otherwise without disre-

garding the plain meaning of the words, and the rule laid down for its interpretation in the 22nd Section of the 1st Article."

In *Navajo Mining, Etc., Co. v. Curry*, 147 Cal. 581, the Supreme Court had under consideration the provision of Section 11 of Article XII of the Constitution, which prohibits any increase of the capital stock of a corporation except at a meeting called for that purpose, public notice whereof is required as provided by statute.

In the case before the Court all of the stockholders had consented in writing and the corporation maintained that as the sole object of the statute providing for publication of notice had been accomplished by such unanimous consent the statutory provision should be held merely directory. In holding otherwise the Supreme Court said:

"There is both reason and authority to sustain this contention as applied to a statute, but in this State we have not only a statute to construe, but a constitutional provision which in express terms prohibits any increase of the capital stock of a corporation 'without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law.' (Const., Art. XII, Sec. 11.)

"A provision of the Constitution of Missouri substantially identical was held by the Supreme Court of that State to be directory. (*Riesterer v. Horton Land and Lumber Co.*, 160 Mo. 141 (61 S. W. 238). But we could not place the same construction upon the above quoted provision of our Constitution *without disregarding not only its expressly prohibitory terms but also*

the rule prescribed by the Constitution itself for the effect to be given to its provisions. (Const., Art. I, Sec. 22.)"

The long and short haul clause of Section 21 of the Constitution is equally applicable to carriers, the Legislature and the Commission. *It prohibits a certain method of rate making and rate charging. It is an absolute prohibition binding upon all.* The prohibition of the Constitution if it would render unconstitutional a rate fixed by the Legislature in contravention thereof must also render unconstitutional a rate attempted to be fixed by the Commission in contravention thereof. The duty imposed upon the Commission would, in the absence of the provisions of Section 22, be vested in the Legislature, and because the people saw fit to vest that duty in the Commission it cannot be said that the Commission could violate the positive prohibition contained in Section 21 of the Constitution.

The provision that the rates established shall be deemed conclusively just and reasonable must refer to rates *constitutionally enacted or established.*

In *Scott, Magner & Miller v. Western Pacific Railway Company* (Decision No. 579, Case No. 263) before the California Railroad Commission the complainants sought reparation for charges paid on shipments from Livermore to San Francisco on the ground that lower rates were charged to San Francisco from Lathrop, a more distant point. Some of the claims in the *Scott, Magner & Miller* case accrued prior to the amendment to the Constitution of October 10th, 1911, and some after such amendment. With reference to the claims that accrued prior to October 10th, 1911, the Commission held

that the terms of the long and short haul clause of the Constitution of 1879 were not violated because no greater charge was made to a more distant point. In the case under consideration by the Commission a lower rate was charged from Lathrop to San Francisco than from Livermore to San Francisco, but the charge to San Francisco from Livermore did not for that reason violate the constitutional provision because there was no less charge to a more distant point, San Francisco being the terminus of the line. The Commission said:

“The provisions of the Constitution of 1879, however, look only to the point of destination. The offense under those provisions was not complete unless other transportation was made for a lesser charge to some ‘more distant station, port or landing,’ *i.e.*, to some point D beyond point C. In the present case, there was no point on defendant’s line beyond San Francisco and no lesser charge to any more distant point beyond. Hence, under the facts of this case, no cause of action arose under the long and short haul clause of the Constitution of 1879.”

That such is the proper construction of the constitutional provision seems beyond question. It would appear, however, that the Commission did not confine itself to holding that the long and short haul clause of the Constitution of 1879 was not violated, but deemed it advisable to give its views upon matters of law which were not necessary to its decision.

After disposing of the complainant’s claim on the ground that there was no violation of the long and short haul provision of the Constitution the Commission considered the long and short haul clause of the so-called Wright Act of March 19th, 1909. The

long and short haul provision of that act read as follows:

“No common carrier subject to the provisions of this act shall charge or receive any greater compensation in the aggregate for the transportation of passengers or of a like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any such common carrier to charge and receive as great a compensation for a shorter as for a longer distance haul.”

It will be noted that the clause of the act prohibited a greater charge for transportation “for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance.” In this respect it is similar to the provision of the Interstate Commerce Act and to the provisions of our Constitution as amended October 10, 1911. The provision of the act was in this respect broader than that of the Constitution of 1879 as, unlike the constitutional provision, it prohibited a greater charge for the shorter than for the longer haul *irrespective of whether or not a lesser charge was made to a more distant point*. In this respect, therefore, it applied to the circumstances of the *Scott, Magner & Miller* case, where the charge from Lathrop to San Francisco was lower than the charge from Livermore to San Francisco.

The Commission, therefore, had before it the question as to whether the complainants were entitled

to damages for violation of the clause of the Act of 1909. The provisions of the act, as we have seen, only applied where the conditions were "substantially similar." *In the Scott, Magner & Miller case it was conceded that the rates charged had never been established by the Commission.* Referring to the rights of the complainants under the Act of 1909, the Commission said:

"If the Railroad Commission had established the rates to be charged by this defendant for both longer and shorter hauls, it might well be held that the defendant could not thereafter, as long as it conformed to the rates so established, be compelled to pay for a violation of the long and short haul clause. Otherwise, the defendant would have been compelled to pay damages if it charged the rates established by the Commission and also a fine up to \$20,000 for each offense if it failed to charge those rates. It would be compelled to pay both if it obeyed and if it disobeyed the Railroad Commission's order. There would be much reason for holding that after the Railroad Commission had established the rates, as commanded by Section 22 of Article XII of the Constitution, the long and short haul clause of the Constitution would no longer avail a shipper except as a basis for an application to the Commission to change the rates established by it so as to conform to the long and short haul principle established by the Constitution. It becomes unnecessary, however, to consider this question further at this time for the reason, as heretofore stated, that the Railroad Commission did not during the period of the Wright Act establish the rates charged or to be charged by defendant on movements of hay transported between the points specified in the complaint in this case. Those rates were railroad-made rates and not State-made rates. As heretofore

stated, if the circumstances and conditions surrounding the longer and the shorter haul movements were substantially similar, a substantive right to compensation arose under the Wright Act.”

The Commission had held that there was no violation of the Constitution because the Constitution did not apply unless there was a lesser charge to a more distant point. Therefore it was not concerned with the long and short haul clause of the Constitution of 1879. It was also an admitted fact that the rates charged in the *Scott, Magner & Miller* case were never established by the Commission; therefore there was no occasion for a determination as to whether or not the Commission could “establish rates which contravened the prohibition of Section 21 of the Constitution.” The statements of the Commission set forth above are therefore merely *dicta*. Moreover, as shown by the foregoing quotation from the opinion of the Commission, it was not the intention of the Commission to finally pass upon this point. *The Commission expressly declined to further consider the question on the ground that it was not involved.*

Moreover, the Commission was not concerned with the long and short haul clause of the Constitution of 1879, but only with the clause of the Act of 1909, which covered cases to which the provision of the Constitution did not apply. It may well be that the clause of the Act of 1909 could not be construed so as to prevent the Commission from establishing rates contravening that clause *insofar as that clause went beyond the terms of the long and short haul clause of the Constitution*, for the duty to establish rates was constitutionally enjoined upon the Commission and it would seem that no act of the Legislature

could control that power. The quotation from the opinion of the Commission shows that the Commission confused the prohibition of the Constitution of 1879 with the long and short haul clause of the Act of 1909.

There is no reason why the long and short haul clause of Section 21 should be restricted to carriers and should not operate equally against the Legislature or the Commission. Nor is there any foundation for the dictum of the Railroad Commission that this prohibition "is based on the theory of railroad-made rates." There is nothing in the terms of the Constitution restricting it to carriers and it formed a part of the same Constitution containing Section 22, which provided that it should be the duty of the Commission to establish rates.

By such construction a prohibitory clause of the Constitution is reduced to a rule for the guidance of the Commission which the Commission may follow or disregard at its pleasure.

It will also be observed that under this construction the absolute long and short haul clause of the Constitution would be less absolute than the clause as it at present exists, for under the Constitution as it now exists the Commission can only relieve in special cases after investigation, whereas if such were the proper construction, the Commission could, prior to the amendment of October 10th, 1911, have wholly disregarded the prohibition without any investigation.

In 1906 Section 15 of the Interstate Commerce Act was amended so as to confer upon the Interstate Commerce Commission the power to establish rates.

Section 15 as so amended contained the following provision:

“That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in Section Thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, *to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged.*”

In 1910 the Fourth Section was amended by striking out the words “under substantially similar circumstances and conditions” and by adding the provision for an application to the Commission for relief from what then became an absolute prohibition against the charging of more for the short than for the long haul.

At the time of the Amendment of 1910 to the Fourth Section, there were many members of Congress who favored an absolute prohibition against charging more for the short than for the long haul and the section as then amended was a compromise

between these members and those who believed an absolute prohibition inexpedient.

In the *Intermountain Cases*, 21 I. C. C. 334 (decided June 22, 1911), Commissioner Lane said:

“The section was the result of a compromise between the two elements in the national legislature which had been compromising as to this section ever since the act to regulate commerce was first proposed. There have been those who favored an absolute prohibition and those who favored a prohibition with exceptions. When these two forces met, after long and fruitless discussion, the present compromise section was suggested. This, it is said, was acceptable to the radicals—the absolutists, so to speak—for they believed that without these words “under substantially similar circumstances and conditions” in the act the proviso (viz.: the proviso that the Commission could relieve from the prohibition) would be unconstitutional and the provision would become clearly mandatory and a perfect prohibition against the charging more for the shorter than the longer distance.”

If in 1910 the advocates of an absolute long and short haul clause had succeeded in amending the Fourth Section according to their views, could it be said that the Interstate Commerce Commission nevertheless had the power to “establish” rates which would conflict therewith?

And at the present time under the Fourth Section as it now exists can it be said that the Interstate Commerce Commission has the power to “establish” rates which violate the prohibition of the Fourth Section in a case where no application has been made for relief under the proviso of the Fourth Section and

where no relief has been granted pursuant to such application?

We think it must be apparent that the Interstate Commerce Commission has no such power; that its action in establishing rates must be governed by the provisions of the Fourth Section; and that any rates established in violation of the prohibition of the Fourth Section are illegal and void.

In the *Scott, Magner & Miller* case, *supra*, the Railroad Commission of California suggests that after the rates had been established by the Commission the long and short haul clause would no longer “avail a shipper *except as a basis for an application to the Commission to change the rate established by it so as to conform to the long and short haul principle established by the Constitution.*”

By this course of reasoning the Commission is entitled to wholly disregard the prohibition of the Constitution in establishing rates; but in its discretion may consider the prohibition as a “principle” in establishing rates. That generally there shall be no greater charge for the short than for the long haul is one of the established rules of rate making and if there were no such prohibitory clause in the Constitution the Commission could consider that rule in *establishing* or *changing* rates. By such construction the prohibition of the Constitution is wholly nullified.

Is it conceivable that the advocates of an inflexible long and short haul clause in the Interstate Commerce Act supposed that the Interstate Commerce Commission could “establish” rates in violation thereof? As we have seen, the long and short haul provision prohibits a certain method of rate making,

and must be an absolute prohibition binding upon all. No reason has ever been suggested why a rate-making body such as the Railroad Commission cannot make its rates conform thereto. Nor is there anything in the duty of establishing rates inconsistent with a provision of law that in establishing them a prohibition against establishing certain kinds of rates shall be observed. The purpose of the long and short haul clause is to prevent a method of rate making which is deemed contrary to public policy and inimical to the best interests of the commonwealth. No reason can exist why the prohibition is not as equally binding upon a rate-making body as upon the carrier.

The clearly expressed purpose of the people can be effected only by construing this prohibition as rendering unconstitutional rates attempted to be established by the Commission in contravention thereof.

In the brief of plaintiff in error it is said that the provisions of Sections 21 and 22 of the Constitution of 1879, are to be construed "in *pari materia* and must harmonize, or one or the other of the two apparently conflicting provisions become meaningless."

But, as we have seen, the provisions of Sections 21 and 22 of the Constitution of 1879, do not conflict. Plaintiff in error has made not the slightest attempt to show wherein they conflict.

In support of its contentions that the Commission could legally establish rates which violated the absolute prohibition of Section 21 plaintiff in error refers to the provision of Section 22 to the effect that a railroad corporation which failed or refused to conform to the rates established by the Commission should be

fined not exceeding \$20,000 for each offense, and also the provision of Section 22 that in all contentions, civil or criminal, the rates established by the Commission shall be deemed conclusively just and reasonable.

But, as we have seen, under the self-declared rule for the construction of the Constitution of California, its provisions are mandatory and prohibitory unless expressly declared to be otherwise. Therefore, the provision of Section 22 that any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such Commission shall be fined not exceeding \$20,000 refers unquestionably to rates constitutionally established—*that is to rates which do not violate the absolute prohibition of Section 21*. And so must the provision that the rates established by the Commission shall be deemed to be conclusively just and reasonable refer to rates constitutionally established by the Commission. We submit that the authorities cited and argument made in the foregoing part of this brief conclusively show that such is the case.

Plaintiff in error makes no attempt to argue that the *dicta* contained in the opinion of the Commission in the *Scott, Magner & Miller* case is sound law, but merely quotes from the opinion in support of its contention that the Commission could constitutionally establish rates which contravened the absolute prohibition of Section 21. Notwithstanding the statement that the *Scott, Magner & Miller* case “was a contested case” the conclusion appears irresistible that the Commission did not give any consideration to Section 22 of Article I of the Constitution which

provides that the provisions of the Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise. This section of the Constitution is not referred to in the opinion nor is there anything therein contained which would indicate that it was referred to by any of the attorneys present at the argument. We believe the fact to be that the argument of the railroads' attorneys was adopted by the Commission because it seemed plausible and because it was never replied to by the attorneys present. This appears all the more likely when it is seen, by reference to the opinion itself, that the determination of this question by the Commission was not in any manner necessary to the disposition of the matter under consideration at the time.

Section 21 contains a special prohibition against a certain kind of rates which were deemed inimical to the best interests of the State. Section 22 contained the general provision authorizing the establishment of all rates. This provision was intended to be most comprehensive and for the purpose of securing adherence to the established rates the penal provisions referred to were made a part of the Section. These penal provisions applied to all rates established by the Commission and were a part of a comprehensive plan for the establishment of rates by the Commission. It does not follow because such or similar penal provisions were not annexed to the special prohibition of Section 21 that this prohibition was not binding upon the Commission, but was thereby reduced to a mere rule for its "guidance" which the Commission could follow or ignore in its discretion.

The provisions of Section 22 that in all controversies, civil or criminal, *the rates established by the Commission shall be deemed conclusively just and*

reasonable do not add anything to the meaning of the section. These words are wholly unnecessary as if they were omitted from the section the rates established by the Commission would be conclusively just and reasonable.

The provision that the Commission shall establish rates by its very terms implies that the rates shall be deemed conclusively just and reasonable in all proceedings, civil or criminal, subject only to the provision of the Federal Constitution that they shall not deprive the carrier of its property without due process of law. Any other construction of this provision would render the whole section nugatory.

The Interstate Commerce Act which confers upon the Interstate Commerce Commission the power to establish rates contains no express provision that the rates so established shall be deemed to be conclusively just and reasonable in all civil and criminal proceedings but they are conclusively just and reasonable nevertheless.

In any civil action to recover for an overcharge or in any criminal action involving a rebate can it be questioned that the Court must conclusively presume that the rates fixed by the Interstate Commerce Commission are just and reasonable? By this is meant that no evidence will be permitted to be introduced to the effect that the rates are unjust or unreasonable. The determination of the question of their justice and reasonableness has been committed to the Commission, and it is without the province of the courts to pass upon that matter.

Section 22 of the Constitution, as amended October 10th, 1911, which confers upon the Commission the power to establish rates, does not contain any express

provision that the rates so established shall be deemed conclusively just and reasonable nor does the Public Utilities Act contain such a provision. Nevertheless the rates established by the present Commission are conclusively just and reasonable and their justice and reasonableness are not open to question in any civil or criminal proceeding whatsoever, provided always of course that they are not confiscatory.

The proceedings of the Constitutional Convention of 1879 clearly show how the *express* provision that the rates should be deemed conclusively just and reasonable came to be inserted in Section 22.

The sentence containing this provision was not contained in the original draft of the Section as reported by the Committee on Corporations other than Municipal. Judge Campbell offered an amendment providing that there should be added to the Section a sentence reading as follows:

“The rate of freights and fares established by said Commissioners shall, in all controversies and proceedings, whether civil or criminal be deemed *prima facie* just and reasonable.”

The purpose of the part of Judge Campbell's amendment providing that the rates established by the Commission should be deemed prima facie just and reasonable was to deprive the rates fixed by the Commission of their conclusiveness. Judge Campbell clearly realized that the provision of Section 20 (now Section 22) to the effect that the Commission should have power to establish rates and fares meant that the fares so established should be deemed conclusively just and reasonable. He said (pg. 541):

“The report of the committee, it seems to me, goes too far in one direction, and not far enough

in another. In one respect it confers absolute powers upon the Commission; it enables them to fix rates of freights and fares, reasonable or unreasonable, without any appeal from their judgment, without any right to contest in any way the fairness of their proceedings."

His purpose in proposing the amendment that they should be deemed *prima facie* just and reasonable was to render them reviewable by the courts. He said (pg. 592):

"Now there is one point where this amendment presented by myself, differs from that presented by the Committee on Corporations. It is this: I do not in this give them absolute power to fix just rates as they please, without any appeal. In my amendment, if the railroad deems the rates unreasonable, it may take its chances in going into the courts; and if it does go there, the rates fixed by the Commissioners are deemed *prima facie* evidence that the rates are reasonable, and the burden of proving that they are not so rests upon the corporation."

Judge Campbell said:

"The report of the committee, it seems to me, goes too far in one direction, and not far enough in another. In one respect it confers absolute power upon the Commission; it enables them to fix rates of freights and fares, reasonable or unreasonable, without any appeal from their judgment, without any right to contest in any way the fairness of their proceedings."

Judge Campbell's amendment was amended by

changing the words “*prima facie*” to “conclusively.”

Mr. Cross (page 607) with reference to the words “*prima facie*” used in Judge Campbell’s proposed amendment said:

“There could not be a more favorable provision to the railroad company than the one we have adopted. After we have removed from the Legislature the power to regulate fares and freights, and placed it in the hands of the Commission we say that the rates established by them shall be *prima facie* rates. * * * We have got to send this back to the Committee on Corporations and change this, or let it go out to the people of this State that this Convention has fallen into the hands of this railroad company; that a gentleman here by a strong anti-railroad speech, and sandwiching in this word *prima facie* blinded this Convention and made us the tools of the railroad.”

Later Mr. Campbell (pg. 608) defended the use of the words “*prima facie*” and said he did not think that the testimony of a railroad official and an interested party that a rate in his opinion was unreasonable should be deemed sufficient to overcome the presumption that the rate was reasonable.

Mr. Cross (pg. 610) asked Mr. Campbell this question:

“Would the gentleman not consent to amend his resolution so as to have the words ‘*prima facie*’ stricken out and the word ‘conclusive’ inserted?”

Mr. McCallum (pg. 610) proposed the following amendment to Mr. Cross’s amendment:

“*Resolved*, That the Committee on Corporations other than municipal be instructed to further amend Section Twenty, as adopted by the Committee of the Whole, by striking out the words ‘prima facie’ as they occur near the last of the section, and inserting instead thereof the word ‘conclusively.’ ”

With reference to the words “In all controversies civil or criminal the rates of freights and fares established by the Commission shall be deemed prima facie just and reasonable” proposed by Judge Campbell’s amendment, Mr. McCallum said:

“*Strike those words out entirely.* You have said in one place that the Commissioners shall have power to establish rates of freights and fares. *Having said that, this other is simply unnecessary*, except upon the idea that you propose to say that the rates so established shall be only prima facie just and reasonable. This will leave the rates fixed by the Commissioners the legal rates, as in any other case where they are fixed by authority of law.”

Mr. Estee, the chairman of the Committee on Corporations other than Municipal, with reference to the words “prima facie” (page 613), said:

“And the words ‘prima facie’ are undoubtedly worse—worse than all. *It makes the entire preceding portions of the section meaningless.* In other words, the first part of the section says they shall have power to regulate freights and fares. The Commissioners may establish rates of freights and fares.”

Mr. Estee further said:

“The next proposition is that of the gentleman from Placer, Mr. Filcher, which provides for striking out the words ‘*prima facie*,’ and inserting the word ‘conclusively.’ That would not be right at all; and why? You leave the section as it stood, and it provides that the Commissioners shall fix the rate of freights and fares. *That it is true, is conclusive. That is conclusively beyond any question.*”

Mr. Howard said (pg. 614):

“Now, sir, I am in favor of striking out the words ‘*prima facie*.’ They are not necessary, and ought not to be there. Because, if the Commissioners can decide, for instance, that five cents per ton per mile is the rate to be charged, *then that decision is conclusive, unless we take the breath all out of it by saying that it shall be only prima facie. It is just as conclusive as a decision of the Supreme Court of the State, or any other Court.*

Briefly stated, the situation was as follows: The section, as first reported by the committee, contained identically the same provision with reference to the power of the Commission to establish rates as the section finally adopted by the convention and by the people. Judge Campbell proposed an amendment providing penalties, and also providing that “The rates of freights and fares established by said Commission shall, in all controversies and proceedings, whether civil or criminal, be deemed *prima facie* just and reasonable.” The amendment in this form was temporarily adopted; but upon further consideration it was realized that the words “*prima facie*” had the effect of rendering the whole section nugatory. Some

were in favor of striking the clause out entirely, while others wished to change the words "prima facie" to "conclusively." It was conceded that the meaning was the same, whether the clause was stricken out bodily or the word "conclusively" inserted. *Either method of dealing with the clause had the effect of rendering the rates established conclusively just and reasonable.* In view of the fact that such amendment had been temporarily accepted, it was probably deemed better to change the words "prima facie" to "conclusively," so that the contention could never be made that by striking out the "prima facie" clause the convention intended that the rates should not even be deemed "prima facie" just and reasonable.

Plaintiff in error states:

"Plaintiff's whole case proceeds upon the theory that notwithstanding these rates had been fixed in the most formal manner by the Railroad Commission, the carrier should have obeyed the supposed mandate of the Constitution and charged the lesser rate."

Not only were the rates not "fixed" in a formal manner but if the Commission attempted to establish a greater charge for the shorter distance its act being in direct violation of Section 21 of Article XII of the Constitution was a mere nullity. As to the "supposed mandate" of the Constitution referred to by plaintiff in error it may be said that this mandate was expressed in terms so plain and unmistakable as to leave not the slightest doubt that a person was entitled to have his property transported for the shorter distance at charges not exceeding the charges for the

greater distance. We will again quote the Constitutional provision:

“Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing.”

If this provision of the Constitution did not render a greater charge for the shorter distance unlawful it would be extremely difficult to imagine either a constitutional or statutory provision that would render unlawful any charge made by a carrier.

Plaintiff in error cites the case of *Factors & Traders Insurance Co. v. New Orleans*, 25 La. Am. 454, which was an action to recover a tax under a statute subsequently held unconstitutional. In that case the Court held that the plaintiff could not recover. This decision is in line with the great weight of authority in cases of taxes voluntarily paid under statutes subsequently declared unconstitutional. These decisions are placed upon the ground that money so received by the public authorities should not be refunded for the reason that the public interest might suffer if repayment were required. These decisions are based upon the theory that the public authorities may have expended the money so received or may have incurred liabilities upon the assumption that the money so received was a part of the public funds.

Plaintiff in error quotes a portion of the opinion of the Court in *Factors & Traders Ins. Co. v. New*

Orleans, supra, wherein the Court states that "rights may be acquired under a law which may be determined to have been unconstitutional." This statement of the Court is referred to in support of the contention of plaintiff in error that it has the right to retain illegal and excessive charges collected by it because they were specified in tariffs purporting to have been approved by the Railroad Commission, notwithstanding the act of the Commission directly contravened the mandate of the Constitution which in express terms made the charges collected illegal.

In the opinion of the learned Judge of the District Court rendered upon sustaining the demurrer to the alleged defense that the rates charged were established by the Commission it is said (Record pg. 362) :

"The fourth defense sets up that the rates obtaining prior to October 10, 1911, when the Constitutional provision was amended, were authorized by the Commission and could not be deviated from by the carrier without subjecting it to severe penalties as provided in Section 22 of the same article of the Constitution.

"But the answer to this is that until the amendment of October 10, 1911, empowering the Commission to relieve carriers in special instances from the effects of the long-and-short-haul clause, the prohibition was absolute and as obligatory upon the Commission as upon the carrier. Before that amendment the Commission was as powerless to fix rates in contravention of the prohibition as the carrier was to charge them; and if it assumed to do so its act was simply void and not only cast no obligation upon the carrier to obey its order, but afforded no protection for such obedience. There is nothing of substance in the claim that Section

22, when construed *in pari materia* with Section 21, is a limitation upon the latter or in any respect modifies the provisions of the clause in question. Obviously, the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21, and it is only rates so fixed that are to be 'deemed conclusively just and reasonable,' either as an obligation upon or protection to the carrier. Any other interpretation of the sections would be in violation of cardinal rules of construction. This defense is therefore not well taken."

7. THAT IT WAS NOT INCUMBENT UPON THE PLAINTIFF BELOW TO PROVE THAT THE COMMISSION HAD NOT RELIEVED PLAINTIFF IN ERROR FROM THE PROHIBITION OF THE CONSTITUTION, BECAUSE IF SUCH RELIEF HAD BEEN GRANTED, IT WAS A MATTER OF DEFENSE WHICH THE LAW REQUIRES THE DEFENDANT TO PLEAD AND PROVE.

Plaintiff in error contends that the District Court should have granted the defendant's motion for a nonsuit as to the causes of action accruing after October 10, 1911, because the plaintiff did not affirmatively show that defendant had not been relieved from the prohibition of Section 21, Article XII, as amended October 10, 1911.

This contention is opposed to the well established rule of pleading in civil cases that if a defendant desires to bring himself within an exception contained in a statute he must affirmatively plead and prove the facts showing that he comes within the exception.

Prima facie the charging of more for the shorter than for the longer distance was illegal under Section 21 of Article XII as amended. If, upon the carrier's application in a special case, and after investigation, the Commission had in any case granted relief it was incumbent upon the plaintiff in error to plead and prove it.

Plaintiff in error refers to the allegation of the complaint that the Commission had not authorized the defendant to charge less for the longer distance and the statement is made that counsel for the plaintiff "saw the necessity" of "negativizing the idea that the Railroad Commission might have granted relief."

The allegation of the complaint referred to was wholly superfluous.

Notwithstanding this allegation of the complaint, the plaintiff in error alleged as a separate defense that the Railroad Commission had relieved it from the prohibition of the Constitution and the demurrer to this defense was overruled by the Court.

Plaintiff in error states that "upon familiar principles of pleading it was incumbent upon plaintiff to make this showing of non-action by the Commission affirmatively," but it is not stated what this familiar principle is.

Furthermore, even if the Court had erred in denying the motion for a nonsuit, the error was cured by defendant's introduction of the evidence supplying the alleged defect in plaintiff's evidence:

Higgins v. Ragsdale, 83 Cal. 219, 221.

Russell v. Pacific Can Co., 116 Cal. 527, 530.

Plaintiff in error states that it does not appear that the orders offered by the defendant "were all the orders made by the California Commission."

The argument here is, in effect, that defendant in error might have offered in evidence some order of the Commission inuring to the benefit of plaintiff in error, which order plaintiff in error has overlooked—in other words that defendant in error might have made a better attempt at sustaining plaintiff in error's defense than plaintiff in error itself did.

If defendant in error had been required to show affirmatively that plaintiff in error had not been granted relief, such showing would have involved the

proof of a negative. In proving a negative very slight evidence is sufficient to shift the burden of making a *prima facie* case.

Without reference to the order offered in evidence by plaintiff in error, the admissions made at the trial would have been sufficient proof of the negative. At page 397 of the Record the admission is made that the applications for relief were not filed with the Commission until December 30, 1911, and at page 406 of the Record the further admission is made "that these petitions may be considered to have been pending until May 27, 1912, and that they had not been specifically acted upon either prior to that time or since that time except insofar as the decision in Case No. 116 may be considered to have affected them." The Court asked: "They were never specifically acted upon?", and to this question counsel for plaintiff in error replied "No, your Honor." With reference to Case No. 214, in which the applications were filed, it was admitted that on January 2, 1912, when the case came on for hearing "a discussion was held, but no evidence introduced, nothing further was done; it was postponed without day." (Record page 423.)

8. NO REPARATION ORDER OF THE RAILROAD COMMISSION WAS NECESSARY IN ORDER TO ENTITLE THE PLAINTIFF, OR ITS ASSIGNORS, TO MAINTAIN AN ACTION IN THE COURTS.

In ruling against this contention of plaintiff in error that the Court had no jurisdiction because it was not alleged in the complaint that plaintiff had obtained a reparation order from the Railroad Commission, the learned Judge of the District Court said (Record, page 363):

“Logically, the sixth defense, as involving the jurisdiction of the Court to entertain the action, should be first disposed of. Its allegations proceed upon the theory that the Court has no jurisdiction of the subject-matter of the action because plaintiff has not applied to the Railroad Commission for a reparation order as provided in Section 71 of the Public Utilities Act of December 23, 1911. (Chapter 4, Stats. Cal. Spec. Sessn. 1911).

“But this section has reference, when properly construed, only to instances where the question whether the carrier has charged an excessive or discriminatory rate is dependent upon facts to be ascertained from an investigation upon evidence taken by the Commission as in *Texas & Pacific Ry. Co v. Abilene, etc., Co.*, 204 U. S. 216, and *Robinson v. B. & O. R. R.*, 222 U. S. 506. It can have no application to an instance where, as here, if the over-charge was made as alleged it was unwarranted as matter of law. In such case the rate ‘was unlawful under any pretense or for any cause’ and was not question to be referred to the Commission (*Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184), but falls within the provisions of Section 73 (subdivision A) of the Utilities Act, which authorizes the aggrieved party to prosecute an action

in the courts 'for any loss or injury arising from a failure of the carrier to do any act or thing required to be done by the Constitution or any law of the state or any order or decision of the Commission.' This defense is therefore untenable."

This matter has already been passed upon both by the District Court of Appeal for the Second Appellate District of California and also by the Supreme Court of California. The decision of the District Court of Appeal referred to is *Southern Pacific Company v. Superior Court of Kern County*, 20 Cal. App. Dec. 674, 685. After citing the case of *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, the District Court of Appeal said (page 685):

"In the case at bar, we have a situation analogous to that in *Pennsylvania R. Co. v. International C. M. Co.*, *supra*. The cause of action of the San Joaquin Valley Commercial Association, plaintiff in the court below, was based upon a charge which the plaintiff claims was illegal 'under any pretense or for any cause.' If the alleged illegality had been included in a charge made in following an unreasonable or discriminatory schedule of tariffs, the case would be primarily within the exclusive jurisdiction of the Railroad Commission, because that body could regulate and change the tariff itself and could award suitable reparation to be made for any wrong that had been done. But the plaintiff's claim in this action was that the Constitution of the State of California prohibited the defendant from collecting a higher freight charge on transportation of goods from Oakland to Bakersfield than the established rate for a like kind of goods shipped from Oakland to Los Angeles."

The District Court of Appeal further said (pg. 685):

“The record here shows that the demand actually was founded upon the claim that the plaintiff’s assignor had been compelled to pay a charge which was illegal in that it was in violation of the ‘long-and-short-haul’ clause of the State Constitution. If the charge was thus in conflict with the Constitution, it was a charge beyond the jurisdiction of the Railroad Commission, because it was a charge that the Railroad Commission could not legalize after it was made and paid, however just the amount might seem to be—conceding that it could legalize any subsequent charges. The jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief.”

Plaintiff in error refers to the opinion of the Supreme Court of California rendered upon a denial of a hearing after decision by the District Court of Appeal. This opinion is reported at 50 Cal. Dec. 36, and at 150 Pac. 404.

In the course of its opinion, the District Court of Appeal (*vide* first quotation *supra*) said “if the alleged illegality had been included in a charge made in following an unreasonable or discriminatory schedule of tariffs, the case would primarily be within the exclusive jurisdiction of the Railroad Commission.”

Pending the application for a hearing a member of the bar of the Supreme Court on behalf of a client who had been required to pay an unreasonably high rate filed a petition as *amicus curiae* in the Supreme Court requesting the Court to disapprove of this language in the event the Court should deny a hearing. It was in answer to this petition that the Supreme Court used the following language quoted in the brief of plaintiff in error:

“Our denial of the application for a hearing in this Court is not to be taken as an approval of the views of the District Court of Appeal or to the necessity of such action (viz.: prior action on the part of the Commission) in any case.”

If the Supreme Court had any doubt as to the necessity of prior action on the part of the Commission such doubt had no relation to the case considered by the District Court of Appeal but related merely to a case where unreasonable or discriminatory charges had been collected. Moreover there is nothing in the language used by the Court to indicate any doubt on that point. The Court merely declined to pass on the question because it was not involved.

Plaintiff in error states (pg. 130):

“We take the ground that at least since March 23d, 1912, after which date this suit was instituted, *and perhaps before*, a plaintiff who has paid a greater charge for a given distance than the carrier was charging for the same class of property for a greater distance over the same line or route, but who nevertheless has paid the rate fixed by the Railroad Commission of California for the actual movement, and who claims reparation on the ground of a violation of the long and short haul clause either of the Constitution of 1879 or the amendment of 1911, must first apply to the Commission for and secure an order prescribing the amount of reparation to which he is entitled.”

From the foregoing it appears that plaintiff in error's contention that a reparation order is necessary is based mainly upon the provisions of the Public Utilities Act, which became effective March 23rd, 1912. Although it is not expressly conceded that the courts had jurisdiction before March 23rd, 1912,

nevertheless it is not claimed that they had not jurisdiction.

In support of its contention plaintiff in error quotes the last sentence of Section 21 of Article XII of the Constitution as amended October 10th, 1911, which sentence reads as follows:

“Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being *excessive* or discriminatory, provided no discrimination will result from such reparation.”

It is stated that the provision quoted above “clearly shows it to be the intention of the framers of the amendment to confine to the initial jurisdiction of the Commission cases for recovery of an excessive charge.” It is also said that the word “excessive” is used with deliberation, for its meaning is different from that of the word “discrimination.”

In the first place, we submit that the provision quoted above, even as applied to cases of unreasonable and discriminatory charges, does not confer exclusive jurisdiction upon the Commission. It possibly amounts to a grant of power to the Commission to award reparation in such cases, but does not restrict such jurisdiction to the Commission. Secondly, the word “excessive” refers unquestionably to *unreasonable* charges. Doubtless, as stated by plaintiff in error, the meaning of this word is different from “discrimination.” The charges sought to be recovered in this action are *unlawful* charges—they may also be described as “excessive,” but they are excessive because unlawful and not because they are

unreasonable. There is no admission that they are reasonable. In addition to being illegal they may also be unreasonable, but this action is based upon their illegality.

Referring to the part of Section 21 of the Constitution quoted above, and to Section 71 of the Public Utilities Act, plaintiff in error states:

“The word ‘excessive’ is used with deliberation, for its meaning is different from that of the word ‘discrimination.’ In this respect the framers of the amendment of 1911 and of the Public Utilities Act did not follow the provisions of the Interstate Commerce Act, upon which are based the numerous decisions of the Commission and the courts defining the respective jurisdictions of the Commission and courts.”

Even if such a distinction did exist between the Constitution and statutes of California and the Interstate Commerce Act, we fail to see its materiality here; but as a matter of fact *such distinction does not exist*. Plaintiff in error states that Sections 13, 14 and 15, of the Act to Regulate Commerce provide only for applications to the Commission by complaint “of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof.” *The Act expressly declares unlawful the charging of unreasonable and discriminatory rates.*

Plaintiff in error states:

“The provisions of Section 73-a of the California Act, giving a right of action ‘for actual damages,’ and in some cases for exemplary damages, for violation of the Act, do not authorize suit to recover for an excessive or discriminatory charge. The exclusive primary

jurisdiction is vested in the Commission by the reparation section."

For the convenience of the Court we quote below Section 73(a) of the "Public Utilities Act," reading as follows:

"73(a) In case any public utility shall do, cause to be done or permit to be done *any act, matter or thing prohibited, forbidden or declared to be unlawful* or shall omit to do any act, matter or thing required to be done, *either by the Constitution, any law of this State or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom*, and if the Court shall find that the act or omission was wilful, the Court may in addition to the actual damages award damages for the sake of example and by way of punishment. *An action to recover for such loss, damage or injury may be brought in any court of competent jurisdiction by any corporation or person.*"

Plaintiff in error's argument is that this section "does not authorize a suit to recover for an excessive or discriminatory charge." But it is apparent that on its face Section 73(a) *does* give the right to prosecute in the courts an action for damages for an unreasonable or discriminatory charge. Broader language could not be used. Unreasonable and discriminatory rates are declared to be unlawful both by the Constitution and by the Public Utilities Act, and by Section 73(a) it is provided that any public utility which shall do or permit to be done "*any act, matter or thing prohibited, forbidden or declared to be unlawful either by the Constitution*

or any law of this State," shall be liable to the person affected thereby for damages, and that an action to recover such damages may be instituted in any court of competent jurisdiction.

Section 73(a) is certainly broad enough to cover *not only illegal charges such as are here sought to be recovered, but also unreasonable and discriminatory charges*, and if it should ever be construed by the courts to mean that it does not cover unreasonable and discriminatory charges, such construction will have to be based upon the ground that to allow the courts jurisdiction in such suits would be subversive of the purpose of the Act, as held in *Texas & Pacific v. Abilene Cotton Oil Company*, 204 U. S. 426, *supra*, and *Robinson v. B. & O. R. R.*, 222 U. S. 506. As already pointed out, the language is much broader than that used in the Interstate Commerce Act. However, we are not here concerned with the question as to whether or not damages for charging an unreasonable rate can be recovered in an action at law without prior application to the Commission. That matter involves a rate-making question. *No such question is presented to the court by this action.*

Plaintiff in error states that the "omission" of the word "excessive" in Section 73(a) quoted above, and its use in Section 71(a), is significant. Section 71(a) reads as follows:

"When complaint has been made to the Commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an

excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; provided no discrimination will result from such reparation.”

It is quite clear, as we have seen, that Section 73(a) in terms covers claims for excessive and discriminatory charges, as the language used is most comprehensive. There is no attempt made by Section 73(a) to enumerate the various acts which would constitute a violation of the act or the Constitution, *so it follows that there is nothing significant because excessive and discriminatory charges are not mentioned.*

Plaintiff in error states:

“We say that it was the deliberate intention of the Constitution not to allow a court to construe tariffs, schedules and classifications and first to say that there was in effect at the time of the movement to the intermediate point a lesser rate to a more distant point, and then to say that the lawful rate to the intermediate point was not the rate established by the Commission, but was a rate which the Commission had not established for that point but had, for good and sufficient reasons, established to the more distant point; and finally to give judgment for the plaintiff for the difference, without giving the Commission the opportunity to obey whatever mandate is implied by the long and short haul clause, by taking its option of either

raising the through rate or lowering the intermediate rate."

It is said that the courts cannot "construe" tariffs—in other words, that the court cannot determine what every shipper of freight must determine, viz. what rate should be charged for the shipment of a specific article or personal property. It is determined by the shipper by a mere examination of the tariff and is determined by the courts in the same manner. A tariff or schedule of rates published in pursuance of law is said to be in effect a statute, and with equal force it might be said that the courts cannot construe a statute. In the foregoing quotation from its brief, plaintiff in error has confused the question of jurisdiction with its claim that the rates were "established" by the Commission and were, therefore, lawful. Nothing is gained by this confusion. For the purpose of determining this question of jurisdiction we must assume that the rates were unlawful. Therefore the court is called upon in an action of this character to say (1) that there was in effect at the time of the movement to the intermediate point a lesser rate to a more distant point, and (2) that the lawful rate to the intermediate point was the rate charged to the more distant point.

It is said that an action in the courts without first applying to the Commission for reparation does not give the Commission "the opportunity to obey whatever mandate is implied by the long and short haul clause by taking its option of either raising the through rate or lowering the intermediate rate." But, as we ^{have already seen} ~~shall hereafter show~~, neither the Commission nor the carrier could establish rates which violated the constitutional provision and that any

such rates would be unconstitutional and void. If the Commission attempted to "establish" a lower rate for the longer haul than for the shorter haul the carrier was charged with notice of its unconstitutionality and was in duty bound to ignore it.

Plaintiff in error in effect admits the charging of an unlawful rate, for which there can be no legal excuse. It is no answer to an action to recover damages for this act to say that the Commission could have required the carrier to raise its rate to the long haul point or to lower its rate to the intermediate point, so that there would be no violation of the law. *The Commission could not authorize a violation of the law, nor can a carrier excuse a violation of the law by saying that the Commission could have prevented it.* That the Commission could have prevented the exaction of these unlawful charges may be true, but the fact that it did not do so cannot help the plaintiff in error.

With further reference to the contention that "it was the deliberate intention of the Constitution not to allow the courts to construe tariffs," it may be said that in a great variety of actions, concerning which it was never questioned that the courts had jurisdiction, it is necessary to "construe" tariffs and schedules of rates. In all action to recover damages for rebates and overcharges the courts are called upon to construe tariffs.

Plaintiff in error states that the Commission is "the only body in the State having jurisdiction of rates" and that "all of the record evidence necessary in any case under the long and short haul clause is in the files of the Commission itself." But the Commission is not the only body "having jurisdiction of

rates" although it is the only body having the jurisdiction to *make* rates. Nor is "all the record evidence in this case in the files of the Commission." The only record evidence necessary in this case is the tariff showing a lower charge to the more distant point, and these tariffs are on file for public inspection at various offices of the carrier throughout the State, and the carrier may be compelled to produce them at the trial of any action in which they are material evidence.

It is said that the Commission "has rate experts and attaches who we must presume are capable of giving it expert and unbiased testimony when the question arises in a long and short haul case as to what the through rate is." This is not a matter requiring "expert testimony," and if it were that testimony could be given in court by other witnesses than the experts and attaches of the Commission. This is a very simple question of fact which can be determined by a court or jury, and if "expert testimony" is required, it can be given.

Plaintiff in error states:

"It (the Commission) knows also whether, since October 10th, 1911, it has, to use the language of Section 22, authorized the carrier to charge less for the longer than for the shorter distance."

This is likewise a very simple question of fact, readily ascertainable from the public records of the Commission. The Court at the trial of this action had no difficulty in determining the question.

Again it is said:

“More important than all, if the right to reparation exists in case of violation of the long and short haul section it (the Commission) can adjudicate the reparation claims as to prevent the evil of rebating and discrimination which inevitably would arise if one court were permitted to hold our contentions in this case on the general question of jurisdiction to be correct, and another court were allowed to uphold the plaintiff’s position.”

This is a remarkable statement. If it were possible under the authorities for a trial court of California to uphold the contention of plaintiff in error while other courts upheld their jurisdiction no “evils of rebating or discrimination would arise” for the trial courts are not the courts of last resort. All judgments would be subject to review by the Supreme Court of the State and the decision of the court of last resort reversing or affirming the judgments, as the case might be, would soon establish a uniform rule as to jurisdiction binding on all the trial courts.

Plaintiff in error cites the case of *St. Louis Southern Ry. v. Patterson*, 104 N. E. 512, which plaintiff in error states involved the question of overcharges on an interstate shipment. The so-called overcharge was based upon the contention of plaintiff that it demanded cars of 50,000 pounds capacity but was furnished with cars of only 40,000 pounds capacity. The defendant’s tariff specified a minimum charge of \$5 per car and also specified a switching charge of \$2 per car irrespective of capacity. Plaintiff claimed that it was “overcharged” \$1.46 per car because it was not furnished cars of 50,000 pounds capacity.

This was not an overcharge in the sense that the exaction of a greater sum than the tariff rate or of a rate fixed by law is an overcharge, as it involved the determination of the administrative question as to whether the refusal to furnish the cars of the capacity demanded was reasonable. It would seem that such a question should properly be determined by the Interstate Commerce Commission. However, the Supreme Court of Indiana does not seem to have expressly placed its decision upon this ground but placed it upon the ground that if the courts of different States might decide the question in different ways, thereby destroying the uniformity of rates secured by the Interstate Commerce Act. The Indiana court held, therefore, that the State courts did not have jurisdiction. It was evidently of the opinion that the Federal courts had jurisdiction.

Plaintiff in error states that a justice of the peace in one township might decide that the tariff rate to Los Angeles on a certain commodity was $37\frac{1}{2}$ cents per hundred pounds, and that a justice of the peace in some other township might decide that the tariff rate was more or less than $37\frac{1}{2}$ cents. So in a case for damages for rebating one court might erroneously find that a certain rate was the legal rate and another court in which the same question was involved might find that a different rate was the legal rate, but the fact that a court is liable to make an erroneous finding has never before been advanced as a reason why a court should not entertain jurisdiction of a case. Nor has such an argument ever before, so far as we can ascertain, been advanced in any case where the question arose as to whether the courts or the Railroad Commission had jurisdiction

of a claim for damages or reparation. A person is protected against erroneous findings by the right of appeal. In some cases the court of last resort may fall into a like error. Against such a contingency there is no protection. As said by the Supreme Court of California in *Sherer v. Superior Court*, 94 Cal. 355, such errors, "however gross or glaring they may be, must be submitted to as a part of the sacrifice which every individual is compelled to yield to the infirmities of human government."

Plaintiff in error states:

"For the Court to hold that by reason of greater diligence on the part of a shipper or his attorney, community prejudice against one of the parties, greater ability of one attorney for the other, neglect or disinclination to obtain review of judgments, one shipper may obtain the benefit of a rebate from published tariff rates by using the pretense of the long and short haul clause, while his neighbor may be deprived of that benefit, even though he seeks to obtain it in a lawful way, is merely to encourage another form of discrimination."

If there has been a violation of the constitutional prohibition against charging more for the short than for the long haul, and a shipper has thereby been compelled to pay an illegal charge, he is entitled to recover his damages. It cannot be presumed that his neighbor will in a similar case be deprived of the right to obtain like redress; but on the contrary, it will be presumed that the courts will do justice to all and that judgments will be rendered in favor of every person who establishes that he has been overcharged or damaged. If a ship-

per has been damaged by the violation of the constitutional provision, he is entitled to his remedy, and the possibility that some other shipper may, by fraudulent collusion with a carrier, use the same constitutional provision as a pretense to secure a rebate in a case where there was no violation, is no argument against the courts' assuming jurisdiction of an action brought by one who has been actually damaged.

Plaintiff in error cites a number of cases where the jurisdiction of the Railroad Commission was held exclusive. *It is noteworthy that in not one of the cases cited was the question of rates or the question of an unlawful exaction involved.*

The first case cited is *State v. Chicago, St. Paul, Etc., Ry. Co.*, 19 Neb. 476, which was an application for a writ of *mandamus* to compel the defendant to stop trains and build a depot. The Commission was vested by the Legislature with "general supervision of all railroads," and the statute provided that when changes in its stations and depots were desired the Commission should, after a hearing, adjudge what changes it deemed proper.

In *People v. B. H. R. Co.*, 172 N. Y. 90, next cited, it was held that the Railroad Commission had exclusive jurisdiction of an application to compel the restoration of train service.

Grand Trunk v. Perrault, 36 Can. Sup. Ct. 671, next cited was an application to compel the railroad company to maintain farm crossings for the use of plaintiff. The statute empowered the Railway Commissioners, upon the application of any landowner, to order the company to provide suitable farm crossings. Referring to this case, plaintiff in error states:

“The Court lays stress upon the fact that the act provided that the Board’s determination of any fact should be binding and conclusive on all courts, and if there existed concurrent jurisdiction a world of conflict and confusion would ensue.”

In *Grand Trunk v. McKay*, 34 Can. Sup. Ct. 81, next cited, it was held that the Railway Committee had exclusive power to regulate the speed of trains under a statute which provided that they “may” regulate and limit the speed of trains.

In *Bangor v. Railway Co.*, 97 Me. 163, the Court held that the statutes of Maine vested in the Railroad Commissioners the exclusive jurisdiction of the matter of railway crossings.

In *N. Y., N. H., etc., R. R. Co. v. New Haven*, next cited, it was held that the Railroad Commissioners and not the municipality had original jurisdiction of questions relating to changes in highways and grade crossings.

In *Missouri K. & T. R. Co. v. Richardson* (Ok.) 106 Pac. 1108, the Court held that the Corporation Commissioners had power to determine the proper point for the crossing of two railroads.

In *State v. Railroad Commission*, 140 Wis. 145, it was held that the Railroad Commission had the power to determine the point of crossing of railroad tracks.

In *Smith v. New Haven*, 59 Conn. 203, 208, it was held that the Railroad Commissioners had power to pass on the question as to whether a highway should pass under or over the tracks of a railroad company.

In *Cullen v. N. Y. R. Co.*, 66 Conn. 211, last cited, the Court held that the Railroad Commission and not the municipality had jurisdiction of the matter of closing highways which crossed the tracks of a railroad company.

The mere statement of the nature of the cases cited is sufficient to show that they are not authority for the proposition that the courts have not jurisdiction of actions of this kind.

Plaintiff in error has gone far afield in its search for authorities in support of its contention. The question here involved was decided contrary to the contention of plaintiff in error by the Supreme Court of the United States in *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, upon which were based the decisions of the learned Judge of the District Court and of the District Court of Appeal for the Second Appellate District.

CONCLUSION

We believe the conclusion that no error was committed by the District Court will appear from the reading of the brief of plaintiff in error. In each instance, it is submitted, the inherent weakness of the contention made is revealed by its statement and by the arguments advanced in its support. It is respectfully submitted that the judgment of the District Court should be affirmed.

HOEFLE, COOK, HARWOOD & MORRIS,

ALFRED J. HARWOOD,

Attorneys for Defendant in Error.

No. 2643.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff in Error,

VS.

CALIFORNIA ADJUSTMENT
COMPANY, a corporation,

Defendant in Error.

ORAL ARGUMENT AND SUPPLEMENTAL BRIEF ON BEHALF OF PLAINTIFF IN ERROR

In Error to the United States District Court for the Northern
District of California, Second Division.

HENLEY C. BOOTH,
FRANK B. AUSTIN,
GEORGE D. SQUIRES,

Attorneys for Plaintiff in Error.

WM. F. HERRIN,
Of Counsel.

No. 2643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

BEFORE :

HON. WM. B. GILBERT, Circuit Judge,
HON. ERSKINE M. ROSS, Circuit Judge, and
HON. FRANK M. RUDKIN, District Judge.

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff in Error,

VS.

CALIFORNIA ADJUSTMENT
COMPANY, a corporation,

Defendant in Error.

Oral Argument: Tuesday, November 9, 1915

APPEARANCES :

For Plaintiff in Error, HENLEY C. BOOTH, ESQ.

For Defendant in Error, ALFRED J. HARWOOD, ESQ.

Mr. Booth: May it please the Court: I think it perhaps the proper function of this oral argument only to deal with questions which the plaintiff in error feels have not been sufficiently treated in

the printed brief, and in so far as the plaintiff in error may do so, to answer whatever may have been raised in the brief filed by the defendant in error. On account of the length of both briefs, the brief of the defendant in error was somewhat delayed, and was not served on me until yesterday; therefore, I do not know that I can at this time sufficiently answer, if answer be required, a number of the authorities cited in his brief. If at the end of this argument the Court feels that the novelty and the importance of the case is sufficient to justify a request on our part to file either a supplement to our opening brief, or an answering brief, I shall ask permission of the Court to do so.

The case, as I have already intimated, is a case both of novelty and importance. The importance of the case is not measured by the amount involved. There are a number of cases pending in the State Courts of California which involve the validity of claims just such as those sued upon here. I may say, also, that the case is novel, because the Supreme Court of the State of California has never passed upon most of the salient points of this appeal.

Briefly, the case is this: There are two classes of claims sued upon; it is on the law side of the Court; there are 120 counts in the complaint; part of the counts are based upon an alleged violation by the plaintiff in error, a railroad carrier, of the so-called long and short haul clause of the California constitution as it existed from the year 1879 until its amendment on October 10, 1911. The remainder of

the 120 counts are based upon a violation of the long and short haul clause of the California constitution as it was amended on October 10, 1911, and as it exists at the present time. The Court will find, beginning at page 4 of the brief of the plaintiff in error, a copy of the provision of the constitution of 1879. Your Honors will also find, beginning at page 6 of the brief of the plaintiff in error, a copy of the constitutional provisions as they were amended on October 10, 1911.

Now, as to the pleading of these respective counts I have said that they were on the law side of the Court; but perhaps that is not a sufficiently definite statement. Each of these counts alleges that the assignor of plaintiff paid on a certain day for the transportation of a certain commodity between certain points in California, a sum which was in excess of the sum then charged by the railroad carrier for the transportation of the same commodity to a more distant point on the same line or route. And—and I shall come to the point of this presently—it is not alleged in any of these counts that the rate actually charged and collected by the railroad company was unreasonable in and of itself; neither is it alleged in any of these counts, nor was it proven on the trial or attempted to be proven on the trial by evidence on the part of the defendant in error, that the assignors of the defendant in error, or any of them, had been damaged by the collection of the charge which the defendant in error characterizes as an excessive charge. And so the question squarely comes down to whether the defendant in error here

had or has, irrespective of the reasonableness of the charge collected, and irrespective of whether or not he claims to have been damaged, an action at law for the recovery of a rate charged in apparent violation of the sections of the Constitution as it existed before October 10, 1911, or as to the second class of cases, as the same section existed after October 10, 1911.

As the 120 counts in this case naturally fall into one or the other of two classes, the second class, as pointed out in the brief—and I will not elaborate that on the oral argument—is perhaps susceptible of division into two or more classes.

As the counts fall naturally on the one or the other side of October 10, 1911, so do the questions of law involved in this proceeding fall naturally into questions peculiarly federal in their nature and questions peculiarly state in their nature.

The Constitution of 1879, Article 12, Section 21, provided:

“No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for transportation of the same class of freight or passengers within this State or coming from or going to any other State. Persons and property transported over any railroad or by any other transportation company or individual shall be delivered at any station, port or landing at charges not exceeding the charges for the transportation of persons and property of the same class in the

same direction to any more distant station, port or landing.”

Taking up, then, the assault upon the provisions of this section, which is based on the provisions of the Federal Constitution, we say, first, that this section standing alone, as counsel here would endeavor to construe it, does attempt to regulate interstate commerce, and counsel, I think, in his brief, and possibly in his oral argument, will make sufficiently plain the fact that he does consider the section standing alone as a mandatory and prohibitory section which could not be violated either by the carrier or by the Railroad Commission. But does this section standing alone in terms and in and of itself evince an intention upon the part of the framer of the section and upon the part of the people of the State of California when they adopted it, to directly control and regulate interstate commerce.

And secondly: If it does evince that intention, does it, if such intention is clearly shown, necessarily, in and of itself and by the application of it in terms, regulate and control interstate commerce?

And thirdly: If the section in part attempts to regulate and control interstate commerce, is the part of the section which so attempts to regulate and control that interstate commerce, of such a character that it is so inseparable from the remainder of the section that the part which attempts to regulate interstate commerce cannot be disregarded and the remainder allowed to stand.

And lastly: If the section is separable in character, can the Court say and should the Court say that the framer of the section would have so framed it and that the people of the State of California would have adopted it had they known that the part with respect to interstate commerce would fall and be of no effect?

Now, that, in brief, is the first federal question.

The second federal question is this: Giving the long and short haul provision of this section an inflexible effect, an effect which could not be disregarded by the Railroad Commission, as found by his Honor, Judge Van Fleet, on his ruling on demurrer in the Court below—I say, giving it that inflexible interpretation, or giving the interpretation of the amended section, an immediate and automatic operation upon the taking effect of the section, contended for by counsel, does that amount to a taking of property without due process of law?

As to the first proposition, if your Honor please, I think it is quite plain, from a reading of the section, page 4 of the brief of plaintiff in error, that the framer of the section did unquestionably attempt to control and regulate not only discrimination as between points in the State, but discrimination in the charges or facilities for the transportation of the same class of freight within this State or coming to it from or going from it to any other State. The expression could not be more aptly phrased. The framer of the section could not have more clearly evinced his intention to lay down a rule that a

railroad, as to California freight, either going to or coming from a point within this State, should not discriminate as between places and persons.

The first sentence of the section, it may be claimed by counsel, is separable from the second sentence of the section, which contains what is claimed to be an inflexible long and short haul clause, a clause which could not be and has not been legally, according to him, deviated from by either the Railroad Commission or by the carrier. And the second sentence reads:

“Persons and property transported over any railroad or by any other transportation company or individual, shall be delivered at any station at charges not exceeding the charges for the transportation of property of the same class in the same direction to any more distant station.”

Now, manifestly, the framer of the section had in mind in framing the section that he was reading into the law of the State something unknown to common law. The so-called long and short haul principle is merely another effort to prevent discrimination between persons and communities. That, I think, is familiar learning. Discrimination lies at the root of and furnishes the reason for the so-called long and short haul clause as we find it in the Interstate Commerce Act, and in the various states which have made it a part of their organic law or of their commission regulation; and it must be, I think, presumed that the framer of this section had in mind, in placing that in the Constitution, and

that the people had in mind, when they adopted the Constitution with that in it, that discrimination by means of charging more for a given service than for a more distant service was unknown to the common law.

Counsel says in his brief that there is a contrariety of opinion among the State Courts as to whether that particular form of discrimination was unknown to the common law. But, so far as California is concerned, the question is definitely settled by the case of *Cowden vs. Pacific Coast Steamship Company* 94 Cal. 470, in which the Court says:

“A complaint in an action by a shipper against a carrier which substantially alleges that for the same quantity and character of freight the plaintiff was charged a greater amount for transportation from the same point than another merchant, and which does not allege that the charge to plaintiff was unreasonable and excessive, does not state a cause of action at common law, and an allegation of discrimination or inequality is not the equivalent of the allegation of an excessive charge.”

The Court, in this opinion, cites a great many cases holding that under the common law a carrier was free to charge one man more than it did another for the same service, or charge one man less than it did another for a greater service, provided always that the charge made for the service performed was reasonable in and of itself. As I said in the beginning, there is no contention made here, no pleading and no evidence, to the effect that the

charges we actually collected were unreasonable in and of themselves.

If further authority is needed to the effect that discrimination as we know it in modern railroad law was unknown to the common law, your Honors will find it in a case cited in the brief, *Pennsylvania Railroad Co. vs. International Coal Co.*, 230 U. S. 284.

So there was read into and made a part of the Constitution, as I say, a principle unknown to the common law, a new declaration of policy by the State, and of rights and duties on the part of the carrier—taking the most extreme view of it.

How did the Constitution seek to vindicate this right? Not by giving any private right of action to the community or to the individual aggrieved, but by supplementing the section which contained this provision against discrimination by the following section, Section 22, on page 4 of the brief, which created a board of railroad commissioners, which gave them power to establish rates and charges for the transportation of passengers and freight by railroad or other transportation companies, and to publish the same; and which provided that any transportation company which failed to observe those rates, should be fined not exceeding \$20,000 for each offense; and further providing that in all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable, and in any action against such corporation or company for

damages sustained by charging excessive rates—manifestly rates in excess of those fixed by the commission—the plaintiff, in addition to actual damage, might recover exemplary damages; and the legislature was given power to pass all laws necessary to carry this section into effect.

It is a striking thing in this case that for more than 30 years after the enactment of that constitutional provision, we find the commission of the State of California, which continued in existence during that time, absolutely disregarding this so-called long and short haul clause which counsel would have the Court isolate from the remaining sections of the Constitution. We find the commission establishing rates not only as to this but as to all other carriers in entire disregard of that clause. We find the railroad companies disregarding the clause and collecting the rates established by the commission. And it remained for the gentlemen who organized the plaintiff to collect these thousands upon thousands of claims—I am not referring to counsel in this connection, however—I say it remained for those gentlemen to find out after 30 years that there had been a mistaken construction, acquiesced in by everyone, as to the effect of these two sections of the Constitution taken together.

It is true that the learned District Judge supported that theory by saying that the commissioners under these provisions of the Constitution, which he said were mandatory and prohibitory, had no power to fix rates in violation of the long and short haul

clause; and indeed, all of his rulings in the case proceeded upon that theory, that while we had collected rates which had been promulgated by the commission, which were a system of state-made rates,—that while, I say, we had collected those rates, and none others, that while those rates were not alleged in the case to be unreasonable in and of themselves, that while it was not alleged that the plaintiff had been damaged, except by way of argument that damage necessarily followed the allegations of the complaint, nevertheless we should, on the theory of an excessive charge, be compelled to refund to the shippers represented by the plaintiff below the amount of collections which had been made on the basis of tariffs which had been established and promulgated by the commission, and which, if we disobeyed, we were faced by prosecution and a possibly successful conviction and fine of not to exceed \$20,000 for each disobedience.

The acquiescence, I say, is remarkable, and yet there is more to support the statement that it was generally believed that this section was unconstitutional. When the legislature came to propose an amendment to that section to the people at the election of October 10, 1911, it did so by consolidating the provisions of the section and removing what I deem absolutely to show that the old section was regarded as an attempt to regulate interstate commerce. It did so—page 6 of the brief—by saying that no discrimination in charges or facilities shall be made between places or persons for the transportation of the same classes of freight or passengers

within this State,—dropping out the words, “coming from or going to any other State.”

It then provided a general long and short haul clause, but annexed to that a provision that upon application to the Railroad Commission provided for in this Constitution, the company might, in special cases, after investigation, be authorized by such commission to charge less for longer than for shorter distances.

So that it would appear, taking the amended Section 21 of Article 12 as an entirety, that the legislature, itself, and the people, presumably, in adopting the amendment, saw that the old Section 21 was, as we claim, invalid on its face.

This very point, this enforcement of the long and short haul clause of the old Section 21 of Article 12 of the Constitution, was considered by the Railroad Commission of California in a case entitled, *Scott, Magner & Miller vs. Western Pacific Railroad Company*, reported in the second printed volume of the Opinions and Decisions of the California Railroad Commission, beginning at page 626. The commission, after an elaborate discussion, says:

“We are convinced that if the Railroad Commission had established the rates in controversy here, there could have been no right to reparation except for the collection of rates charged in excess of those so established, up to October 10, 1911. We are somewhat uncertain as to the effect which the failure of the Railroad Commission to establish the rate affected as the

right to reparation, but have reached the conclusion that the system of state-made rates established by the Constitution of 1879 could not have contemplated a right to reparation except in case the carrier charged a rate in excess of that established by the commission. In a scheme providing that the State itself establishes rates which shall be conclusively just and reasonable, there is no room for the doctrine of reparation except as indicated. The fact that the commission may have failed in its duty cannot change the law or create a new system."

And then, on page 638, they say that the commission had theretofore decided several reparation cases without giving the matter full study, but that this represented their mature thought on the subject, and that these were given as the final views of the commission up to that time.

This decision was concurred in by all of the commissioners, among whom were Mr. Eshleman, the author of the Eshleman Act in 1910, and Mr. Thelen, the author of the present California Public Utilities Act, and who is now chairman of the commission, and, I think, can safely be said to represent the mature deliberate judgment of the commission.

Now, I have not time to take up with the Court, in this oral argument, the argument as to whether if this section does attempt on its face to regulate interstate commerce, the provisions are so inseparable as to render the whole section void, and whether if, by any possibility, they might be separated, the Court could say even then that they would

have been adopted if it were known that part of them were invalid and part valid.

But, perhaps, in the mind of the Court, as there was in my mind when I came to study this case somewhat, there arises the question: how does this interfere with interstate commerce, even if it is to be given our application?

Let us take, if your Honors please, the road from San Francisco to Portland, Oregon, a road passing from within the limits of California to within the limits of Oregon, and between the termini of which there is an actual competition by water, a competition which has been recognized by the Interstate Commerce Commission in the fourth section cases affecting traffic on that line by establishing a 51-cent rate per hundred pounds from San Francisco to Portland, and by establishing a maximum interstate rate from San Francisco to points in Oregon of \$1.50 per hundred pounds. Let us suppose that you take that schedule of rates established by the Interstate Commerce Commission, pursuant to their authority under the fourth section, and superimpose on that this hard-and-fast long and short haul rule contended for by counsel here, what would be the result? The railroad company could not charge to any point within the limits of California any more than 51 cents per hundred pounds, the through rate from San Francisco to Portland. It might be charging across the line in Oregon the maximum of \$1.50 permitted by the Interstate Commerce Commission's order. The thought may occur

to the Court, how, then, would that affect interstate commerce? Well, let us suppose that there are two business enterprises, jobbing houses, we will say, on either side of the California-Oregon line; under the interstate rate, the Oregon shipper is compelled to pay \$1.30, \$1.31 or \$1.32 per hundred pounds. Under the effect of this so-called inflexible long and short haul rule, the California jobber, on the other side of the line, has his rate measured by the 51-cent water-controlled Portland rate as to which the Interstate Commerce Commission says in the Portland case, 22 Interstate Commerce Reports, page 375, "A railroad is justified under the law in discriminating in favor of one city against another if they are so differently circumstanced that at one point transportation forces are brought into play which are not or cannot be exercised at another point; but a carrier is not justified in deliberately adopting a policy of preference; only the preference or advantage that is due is justified, and that advantage which is bestowed upon a city by the simple policy of the carrier, and not by reason of actual difference in conditions is undue."

This situation was very aptly illustrated by the United States Supreme Court in a case which arose before the Interstate Commerce Act was adopted, the case of *Wabash, St. Louis & Pacific Railroad Co. vs. Illinois*, decided October 25, 1886, reported in 118 U. S. 557. In that case the State of Illinois enacted that if a railroad corporation shall charge, collect or receive for the transportation of freight for any distance within this State the same or a

greater amount of toll or compensation than at the same time was charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, that that should be deemed *prima facie* evidence of unlawful discrimination and the party may recover three times the amount of the damages, and so on. The Court said that if the Illinois statute could be construed as applying exclusively to contracts for a carriage beginning and ending within the State, there seemed to be no difficulty in holding it valid; but at the latter end of the decision, the Court states:

“Let us see precisely what is the degree of interference with the transportation of property or persons from one state to another, which this statute proposes.”

I do not propose to take up the time of the Court in reading this decision at length, as I intend to file a copy of the reporter's notes, at least, but I desire to commend to the Court as an exact illustration of the imposition of this so-called long and short haul on a water-compelled condition, the language of the Court in the concluding portion of the decision in the 118 U. S. to which I have just referred.

NOTE: See also *L. & N. Ry. vs. Eubank*, 184 U. S. 27.

In the brief, your Honors will find authority on the question of separability and on the somewhat more important question in the case whether this

Court can say and should say that the section would have been adopted if it were not for these provisions.

Now, we come to the proposition of the effect of the amendment to these sections adopted on October 10, 1911. I am purposely passing over the argument addressed to the point that the section is unconstitutional as an inflexible operation because it deprives the carrier of property without due process of law; that, I think, can better be treated and worked out in a brief, as we have endeavored to do.

On October 10, 1911, the section was amended. I have already read the substance of the amendment. Section 21 was amended to re-establish the commission, and to provide:

“No provision of this Constitution shall be construed as a limitation upon the authority of the legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of this legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.”

In an opinion written by Mr. Justice Henshaw, and concurred in as to that portion of it by the other Justices of the California Supreme Court, there was decided the case of *Pacific Telephone & Telegraph Company vs. Eshleman*, 166 Cal. 240. Mr. Justice Henshaw, in a trenchant way, calls

attention to the fact that that clause of the amended Section 22 is equivalent to placing the acts of the California legislature with respect to the Railroad Commission in the same situation as acts of parliament, and that they may override, in so far as they are not inconsistent with the provisions of the section,—they may override any other section of the Constitution. That was said in connection with whether the writ of review section of the commission act encroached upon the judicial power of the State. The amended Section 22, however, goes on to say:

“That the Railroad Commission Act of this State”—that is the Eshleman Act of 1910—“shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently therewith and shall have the same force and effect as if it had been passed after the adoption of this provision of the Constitution.”

The Eshleman Act took effect in February, 1910, and there for the first time we find either in the Statutes or the Constitution of California, a right of action prescribed arising out of the violation of this so-called long and short haul clause. The Eshleman Act was expressly continued in force and made a part of these amended provisions of the Constitution. It stated that the penalty for a violation of the constitutional provision relating to rates and fares should be a suit by the State to recover the penalty, thus—as we argue in the brief—definitely negating the idea that it was in the

mind of the legislature that any private right of action should arise.

But in the course of the trial in the Court below, we endeavored to prove that irrespective of federal questions in the case which we have raised by separate defenses, by a motion for a non-suit and by an effort to introduce evidence the defendant below had been relieved by the Railroad Commission after October 10, 1911. We offered in evidence a chain of orders of the Railroad Commission. The first order was dated October 26, 1911, and ordered all carriers to come in and present a list of deviations, if they desired to make such deviations from the long and short haul principle of the Constitution. The second order was dated November 20, 1911, and gave permission in terms to the carriers who did so come in to continue the deviations then existing until the commission could finally pass upon and determine them. The carriers filed those applications; the applications which cover the rates involved in the case at bar were filed on December 30, 1911. On January 7, 1912, an investigation was begun which was not completed, but the commission, following that incomplete formal hearing and investigation, entered an order of February 16, 1912, again relieving all carriers who had filed applications from the operation of the provisions of the long and short haul clause until the commission might have the opportunity of further passing upon and determining the matter.

It was held by his Honor, Judge Van Fleet, that under the language of Section 22 of Article 12 as

amended October 10, 1911, there must be, before relief could be obtained an application filed by the carrier, and an investigation made by the commission. And this investigation, apparently, from his rulings in the case, he took to be such an investigation as might be denominated due process of law—a formal investigation, notice and hearing, and opportunity to produce witnesses and be heard, and all the concomitants of the generally-understood definition of due process of law. Since his ruling in that matter—and I may say that he declined to admit in evidence all of this chain of orders and applications—I say since his ruling in that matter, the Railroad Commission of California so lately as yesterday handed down a decision in which it states what its construction of that chain of orders amounts to, and what its construction of the word “investigation” is. I submit that, while of course the decision of the Railroad Commission has not the same binding force on a pure question of law that the decision of the California Supreme Court might be given by your Honors, nevertheless, being an expert tribunal, being constantly in touch with all of these questions and knowing, if anyone knows, what its orders meant and were intended to be, its opinion should at least be entitled to some weight in considering what it intended to have those orders affect. The decision I refer to is decision No. 2884 of the California Railroad Commission, handed down November 8, 1915, in the case of *Fresno Traffic Association vs. Southern Pacific Company*. The opinion is concurred in by all of the commissioners.

(NOTE: A printed copy is appended.)

In this case, the Fresno Traffic Association claimed that there never had been any relief from the prohibition of the amended section of the Constitution as respected the long and short haul clause, because the commission had never completed the formal proceeding instituted by it, which involved the thousands upon thousands of rates within California. After reciting the chain of orders which were offered in evidence in this case in the Court below and refused admission, the commission says:

“Previous to said order of February 15, 1912, an extended investigation was made by the Rate Department of the commission, under the commission’s instructions and supervision, with reference to the deviations from the long and short haul clause, on the part of the carriers, including the defendants herein as shown by said petitions.

“The evidence in this proceeding shows clearly that the investigations thus conducted by the Rate Department were extended and exhaustive, and that frequent conferences on this subject were held, as the investigation proceeded, between the commission and its Rate Department, prior to the order of February 15, 1912. This investigation, as shown by the evidence herein, covered not merely the general subject, but also was specifically directed to the individual deviations shown in the petitions of the carriers.”

The commission then holds that as it has, after investigation, authorized the carriers pending the further order of the commission to continue the

deviations from the long and short haul clause herein involved, and as the question of the violation of the long and short haul clause is the sole basis of the claim for reparation herein, the complaint should be dismissed.

The case involved in this opinion of the commission which I have just read differs in no respect whatever from the claims involved in the case at bar, which arose after December 30, 1911, the date when the carriers filed application to be relieved from the operation of the long and short haul clause as respected the rates involved in this case.

As to the claims of the defendant in error which arose between October 10, 1911, and December 30, 1911, they are not involved in the decision of the commission, and the decision therefore as to them has only what authority it may have by way of illustration.

I feel that I have already, perhaps, taxed your Honors' patience with merely a few angles of an exceedingly intricate, novel and interesting litigation, as well as an important one to the carriers; we have tried to treat the federal questions fully in the brief, and in addition to that, we have raised certain state questions, such as that the remedy for the enforcement of the constitutional provision is a remedy given by the legislature to the State, and not to an individual; such as the question that the statutes nowhere confer upon the individual a right of action; also the question that it was necessary in this case for the plaintiff to have pleaded and proven

an actual suffering of damages; and the final question, and one which is of exceeding importance, that the plaintiff below should first have applied to the Railroad Commission of the state of California for a reparation order.

As I said in the beginning of the argument, if at the conclusion of counsel's argument the court will see fit to permit me to file a short brief answering whatever authorities he has cited in his brief, which I have not been able to review in the time which has elapsed since the briefs were served, I will appreciate it greatly, and I think that the importance of the case is one that may fairly be said to require it.

I would like to file copies of the opinion of the Railroad Commission last referred to.

I thank your Honors.

Mr. Harwood: May it please your Honors: as counsel for plaintiff in error has referred to but few of the points in the case I will confine my reply merely to the points referred to by him.

The first statement made by counsel was that the complaint did not state that the defendant in error was damaged. If your Honors please, this action is sustainable on two grounds; first, that it is an ^{action to recover an} overcharge, that the charges collected from plaintiff's assignors were overcharges; it is sustainable on the common law theory of an action for overcharge. It is also sustainable, as pointed out in the brief, on the theory that it is an action for damages under the various statutes which were ^{Prior to and} in effect at the

time this action was commenced, the Statute of 1909, the Statute of 1911 and the present Public Utilities Act. It is true that the actual word "damage" is not mentioned in the complaint but facts are stated from which the damage will be conclusively presumed. Therefore the action is an action for damages as well as an action for overcharge. It is also a statutory action under the statutes to recover damages.

Counsel took considerable time on the point that this constitutional provision as it existed prior to the amendment in 1911 is on its face an attempt to interfere with interstate commerce and is a federal question. There is no federal question involved here. It is merely a question of the construction of the section. All the shipments in this case moved in California; the long and short haul point is in California—the long haul point is in California and the short haul point is in California. In no sense is there any question of interstate commerce involved in the case. This is not like the case of *Wabash vs. Illinois*, where the Illinois Supreme Court attempted to give an act similar to ours a construction whereby ~~upon~~ ^a rate in the State of Illinois would be based upon a haul out of Illinois. In other words, the Supreme Court of Illinois in that particular case construed the long and short haul clause of the ~~inter-~~ ^{involved} ~~state-commerce act~~ to mean that the railroad company could not charge for a haul within Illinois a greater rate than it charged in the same direction for a longer distance to some long haul point outside the State of Illinois. That is undoubtedly an interfer-

ence with interstate commerce because it based the state rates upon the rates to a point outside of the state. The Supreme Court held in that case that the act so construed was violative of the federal constitution as an interference with interstate commerce. But at the same time, if your Honors please, the Supreme Court of the United States in that case said that they saw no reason why the Supreme Court of Illinois should have construed the act so as to include such a shipment. The Supreme Court said:

“It might have been a question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the State.”

In this case, if your Honors please, the transportation began and the transportation ended within the limits of the state. The long haul points upon which are predicted the rates to the intermediate points are within the State of California. There is no transportation involved in this case outside of the state. The question raised by counsel is simply a question of the construction of this section of the constitution; it is not a federal question at all.

The matter of the construction of that provision is fully covered in the brief filed by plaintiff in error; I do not think it will be necessary to discuss that matter in detail here.

The long and short haul clause I will read to your Honors:

“Persons and property transported over
 “any railroad or by any transportation com-
 “pany or individual shall be delivered to any
 “station, landing or port for charges not ex-
 “ceeding the charges for transportation of
 “persons and property of the same class in
 “the same direction to any more distant sta-
 “tion, port or landing.”

That can be given full effect by limiting it to shipments within the State of California. Those are the only shipments which the people of the State of California had any right to legislate upon. But counsel for plaintiff in error desires to construe the act for the purpose of holding it contrary to the federal constitution in a case where interstate commerce was in no sense involved, as was in the Wabash case.

Counsel has said that the people of the State of California, if they had known that this alleged interference with interstate commerce was involved might not have passed the section, might not have prevented discrimination. It seems to me that that mere statement upon its face cannot be sustained because the people of California desired to prevent discrimination. Possibly in the first section of the statute they went beyond their rights in trying to prevent it in shipments coming from or going to any other state but certainly that provision can be separated from the others. What reason is there ~~wished to prevent discrimination in interstate commerce that they~~ to say that because the people in California did not wish to prevent discrimination in California the contrary would be the case, that they desired to

prevent discrimination everywhere. It seems to me that when they passed an enactment to the effect that there should be no discrimination in California and also interstate commerce which came into and went out of California that the invalid portion of that section can be separated from the valid portion and it will be presumed that the people of California desired to prevent discrimination wherever they could prevent it; in other words, they attempt by the first section—Section 21 of Article XII, to prevent discrimination in interstate commerce coming to or going from California, but the second section, which is the long and short haul clause, makes no reference to any point outside of California. Standing by itself and if it were the only section in the constitution it could not possibly be subject to the objection made by the plaintiff in error in this case because there is no reference made to any interstate commerce. On its face it does not apply to any commerce, but commerce beginning and ending in the State of California.

Counsel has referred to the penalty which is provided for in Section 22, Article XII of the constitution. There seems to be an argument made more or less to the effect that as this right to have property transported the shorter distance for charges not exceeding those for the longer distance did not exist at common law; that when the people enacted such a provision and in the same constitution provided a penalty for a violation of the constitution, that the penalty is exclusive. That seemed to be the argument made by counsel. Now, if your Honor

please, the rule as gleaned from a reading of the authorities on this subject is this: that where something is forbidden by a statute which is not actionable at the common law and a penalty is provided therefor, the penalty is exclusive except where the statute has vested a right of property in an individual and where the doing of the act prohibited impairs the property right so vested.

In all those cases, although a penalty may be enacted, the penalty is not exclusive, and the right of property can be asserted by the ordinary common law right of action. The authorities to that effect—

Judge Ross: Just read that over again, please.

Mr. Harwood: Where something is forbidden by statute which is not actionable at common law and a penalty is provided therefor by the statute the penalty is exclusive except where the statute has vested a right of property in an individual and where the doing of the act prohibited impairs the property right so vested.

Judge Ross: Had any statute or any provision of the constitution vested any such right in the individual?

Mr. Harwood: The right of property is vested by ~~the reading of~~ this provision: Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing or port at charges not exceeding the charges for the transportation of persons and property of the same class in the same

direction to any more distant station, port or landing. That, if your Honors please, vests in all persons in California the right of property—a property right—to have their property transported by common carriers at rates not exceeding the charges for the longer haul. The authorities in support of the rule that I have stated are *Barden vs. Crocker*, 27 Mass., 383; *Bickford vs. Hood*, 7 T. R. 620; *State vs. Poulterer*, 16 Cal., 525; *Attorney General vs. White*, 2 ^{Commons} ~~Commons~~, 433.

Judge Gilbert: Are those authorities cited in your brief?

Mr. Harwood: No, your Honor, they are not. I desire to say that that point was not made in counsel's brief. And, your Honors, I received their brief only ten days ago and I have had to prepare my brief rather hurriedly.

Counsel refers to actions brought by the plaintiff in this case. The fact is that there are many hundreds of actions pending in the State of California in which the plaintiff is not a party. In a great many of those actions the suits have been commenced in the Justices' Courts and judgment rendered in favor of the plaintiff. The plaintiff in error here has paid those judgments without appealing to the Superior Court. A great many other actions are still pending with which this plaintiff has no connection at all.

Counsel has referred to the Eshleman Act and to the provisions of the constitution as amended to the effect that no provision of this constitution shall

be construed as a limitation upon the authority of the legislature to confer upon the Railroad Commission additional powers of the same or different kind from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission by this constitution; and the authority of the legislature to confer such additional power is expressly declared to be plenary and unlimited by any provision of this constitution. Counsel has not stated the purpose of making this reference. There is no claim made that the legislature has in any way passed an act which after the amendment to the constitution or before the amendment in any way impairs or changes or modifies the long and short haul clause of the constitution as amended on October 10, 1911, and which provides that it is unlawful to charge more for the shorter haul than for the long haul until upon investigation and in special cases the Railroad Commission has given the right to so charge. No act of the legislature has been cited by counsel, and there is no act which in any way changes or attempts to change that provision of the Constitution. But even if an act of the legislature had been enacted which attempts to change that provision it would be unconstitutional because although the legislature, as held by the Supreme Court of this State in the Telephone case in passing acts and conferring powers upon the commission may disregard the constitutional provisions, such as the constitutional provision of this state that private property shall not be taken or damaged without compensation first being made.

And although the legislature may in conferring powers on the commission ignore that and may enact that the commission may take private property without compensation first being made, yet there is nothing in this constitution which would in any way give the legislature the power to in any way change or modify any of the provisions of the California Constitution insofar as they relate to the Railroad Commission or to the subject of common carriers.

That was expressly recognized by the Supreme Court of California in the Telephone case. They can ignore other provisions of the constitution, but they are bound by the provision of the constitution relating to common carriers and the Railroad Commission; they are not empowered to enact any legislation which is in any wise inconsistent with Sections 21 and 22 of Article XII of the Constitution of California.

However, the question is rather unnecessary here because there is no attempt made to show that the legislature has made any attempt to change this constitutional provision.

Counsel has referred to the so-called orders granting relief after the amendment to the constitution. Now, if your Honors please, in the brief of plaintiff in error, no attempt was made to claim that the commission had granted relief. However, there seems to be rather a change of attitude at the present time.

If your Honors please, I will first refer to the seventh further and separate defense to which this evidence which counsel refers to is pertinent:

"For a seventh further and separate de-
 "fense, defendant states that as to each and
 "all of the shipments referred to in plaintiff's
 "separately stated causes of action, which moved
 "or were delivered after October 10, 1911, the
 "Railroad Commission of the State of Califor-
 "nia, pursuant to Section 21, Article XII, Cali-
 "fornia Constitution, as amended October 10,
 "1911, authorized defendant, after investigation,
 "to charge more for the shorter distance to the
 "point intermediate San Francisco and Los An-
 "geles to which such shipment was transported
 "than for the longer distance in the same di-
 "rection."

Pursuant to this seventh separate defense, the
 demurrer to which was overruled by the trial court,
 counsel attempted to introduce these so-called orders
 of the Railroad Commission. This is the contention
 made in the brief by counsel for plaintiff in error: it
 is their contention that these orders which were
 offered in evidence showed that the commission did
 pursuant to the power given it by the Eshleman
 Act, Section 15, to fix rates, actually made a series
 of orders, some of them preceding the filing of the
 petition for relief from the long and short haul
 clause and some of them afterwards, but all of
 them with the intention of preserving the status of
 rates then being charged by plaintiff in error until
 it could be determined by the commission whether
 and if so to what extent it was entitled to relief.
 No contention is made that the relief was granted.

If your Honors please, I do not believe it neces-
 sary to refer to that matter in the argument because

the orders and the admissions made at the trial are all fully set forth in the brief of the defendant in error.

Referring to the order of February 15, 1912—and I will only refer to one—being referred to in the last minute opinion of the Railroad Commission which has been cited here, and of which I was not aware until it was called to my attention by counsel at this hearing, it having been rendered yesterday I believe, according to the copy furnished—the order reads this way:

“Until February 15, 1912, the railroad and
 “other transportation companies may file for
 “establishment with the Commission in the man-
 “ner prescribed by law and in accordance with
 “the Commission’s regulations such changes in
 “rates and fares as would occur in the ordinary
 “course of their business, continuing, under the
 “present rate bases or adjustments, higher rates
 “or fares at intermediate points: Provided that
 “in so doing the discrimination against inter-
 “mediate points is not made greater than that in
 “existence October 10, 1911, except when a
 “longer line or route desires to reduce rates
 “or fares to the most distant point for the pur-
 “pose of meeting by a direct haul reduction of
 “rates or fares made by the shorter line. The
 “Commission does not hereby indicate that it
 “will finally approve any rates and fares that
 “may be filed under this permission or concede
 “the reasonableness of any higher rates to in-
 “termediate points, all of which rates and fares
 “will be subject to investigation and correction.”

That was the order made on February 15, in which the Railroad Commission, according to the opinion which it rendered yesterday, now says they intended to be an order of relief.

Judge Ross: Let me ask you this. I want to see if I can understand this case: the people in attempting to prevent discrimination must act through some agency; in this instance it is up to the Railroad Commission to prevent discrimination. The real question in this case then is whether this section of the statute which you have just read in regard to these private parties having a right to recover if they are charged too much should prevail over that provision creating this public agency to prevent discrimination?

Mr. Harwood: I don't know that I quite follow your Honor's question. The Commission is empowered to prevent certain kinds of discrimination.

Judge Ross: No private party can prevent discrimination. As I understand it, you have organized a corporation to take assignments from people who claim they have been charged too much for the transportation of their products.

Mr. Harwood: The plaintiff in this case is composed of parties who themselves primarily ^{had} been overcharged and who desired to have others co-operate with them.

Judge Ross: Yes, an assignment from those people who claim they have been charged too much for the transportation of their goods.

Mr. Harwood: Yes, your Honor, this action is on ~~an~~ assigned claims.

Judge Ross: Then the real question is whether the statute which you read awhile ago gives to your assignors a right which is paramount to the rights which the Railroad Commission exercises.

Mr. Harwood: In a way it is, your Honor, and also whether or not those rights which are measured and given by the constitution can be ignored by any order of the Railroad Commission. This is a case, if your Honors please, where it is not necessary to obtain a reparation order; it is a case similar in principle to the case of *Pennsylvania Railroad Co. vs. International Coal Co.*, where the United States Supreme Court held that the party damaged could seek his remedy in court without going to the Commission for the reason that discrimination in that case, as in this case, was apparent from the mere doing of the act; it was not necessary that there should be any rate-making question determined in advance to determine whether there was a discrimination, as in some of the other cases, for instance, as in the Abilene Coal Company case, or the case in 222 U. S., where the plaintiff alleged that he was charged more for his coal because it was loaded from wagons than other people were charged because their coal was loaded into cars from tipples; he was charged 50 cents per ton more; in that case the higher rate charged was according to the tariff; in other words, the tariff said, when loaded from wagons the rate is 50 cents higher for coal than when

loaded from tipples. The plaintiff commenced an action to recover. The Supreme Court of the United States held that that was a matter which was proper for the Commission to first pass upon before he could maintain his action in the cause because it was a question of discrimination in tariffs which the Interstate Commerce Commission should first pass upon and determine whether or not that was a reasonable difference.

Judge Ross: Does not that principle apply here?

Mr. Harwood: No, your Honor, that principle does not apply here. The principle that applies here is the principle laid down in *Pennsylvania vs. International Coal Co.*, where the plaintiff in that case was charged a lawful rate; other persons were charged less than the lawful rate, because they had contracted for their coal some year or two before, under the old rate, and ~~therefore~~^{believed} that the railroad company could give them the benefit of a lower rate, lower than the tariff rate. The plaintiff in that case, who knew all along that these other people had been obtaining those rates, and who nevertheless paid the rates mentioned in the tariff, commenced an action in the court to recover the damages sustained by the unlawful act of the carrier in according the lower rate to the other shippers.

~~They~~^{They} did not go to the Commission. The Supreme Court has held that it was not necessary to go to the Commission because the very doing of the act was unlawful, that there was no rate-making question involved and therefore it was not incumbent upon

the plaintiff to get any determination from the ~~Railroad~~ ~~road~~ Commission because the ~~Railroad~~ Commission could not determine that the act was reasonable because it was in direct conflict with the statute. So in this case the charging of more for the short than for the long haul is in direct conflict with the constitutional provision. The case is identical in principle with the International Coal Company case insofar as the jurisdiction of the court and of the Railroad Commission is concerned.

Now, if your Honors please, I will close my argument with a further reference to the orders made by the Railroad Commission which it is now contended by counsel for plaintiff in error allow the carrier to charge more for the shorter haul. This application was filed on the 30th of December, 1911—the application for relief. On the 2nd of January a meeting of the Railroad Commission was held. With reference to this meeting it was admitted at the trial of the case that a discussion was held but no evidence was introduced, nothing further was done, it was postponed without day. The minutes of the meeting were introduced in evidence which showed that no action was taken.

With reference to the petitions themselves this admission was made:

“These petitions may be considered to have
 “been pending until May 27, 1912; they had
 “not been specifically acted upon either prior to
 “that time or since that time except insofar
 “as the decision in case 116, which I am going

...to offer shortly, may be considered to have
 "affected them."

These causes of action all arose prior to May 27, 1912. The decision in case 116 did not take effect until May 27, 1912. So we have the admission here, in addition to the orders themselves, which shows that these petitions for relief were still pending during all the time that these charges were made, the last charge having been made prior to May 27, 1912.

If your Honors please, I do not know just how to characterize this last minute opinion of the Railroad Commission. It is evidently an attempt on their part to in some way bolster up their orders which were made at that time and which were made confessedly under an entire misapprehension of what the law was. The Railroad Commission of this state had reached in the Scott, Magner and Miller case the erroneous conclusion that they had the right to establish rates prior to October 10, 1911, which violated the long and short haul clause of the Constitution of California and in their decision absolutely ignore the authorities of the Supreme Court of this state which state the effect of a constitutional provision upon the legislature, upon the commission and upon everyone. And, if your Honors please, I will conclude my argument ^{with} ~~an extract~~ ^{by} reading from the decision of the Supreme Court in the matter of Maguire, 57 Cal. 607, which was decided after the Constitution of 1879 went into effect:

(Counsel then read at length from 57 Cal. 607.)

Counsel continued:

And so in this case, if your Honors please, the command of the highest sovereignty in this state with reference to rates requires that there shall be no higher charge for a short distance than for a longer distance over the same line and in the same direction, and neither the legislature nor the commission nor the carrier can lawfully charge more for the short than for the long haul.

Mr. Booth: I would like to call the attention of the Court to one matter: It seems to me that the reference by counsel to the decision in the International Coal Company case drawn out by a question from his Honor, Judge Ross, is rather unfortunate for him. In the International Coal Case, a man who had paid the lawful rate sued for damages on the basis of others having been charged a lesser rate for the same commodity, for the same service; in other words, those who received a secret rebate—

Mr. Harwood: There was no secret in that case.

Mr. Booth: It was not a secret to the plaintiff. I don't believe, though, they published it in the papers, or anything of that sort. Mr. Justice Lamar, speaking on the right of the plaintiff to recover, bases that right solely upon the provisions of the interstate commerce act, which gives a man who has been injured by a violation of the provisions of the act, Section 3, for instance, prohibiting discrimination, the right of action to recover damages for such discrimination. If we place this case on the same basis as the International Coal case, as counsel seems to think should be done, counsel brings himself squarely

up against the language of Mr. Justice Lamar when he says that before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has, in fact, operated to his injury.

Then the Justice discusses the cases which were recited against the principle that damage need not be shown in a case of that kind. After citing a long list of cases, he says, on page 898 of the 33rd Supreme Court Reporter: "Those cases relied upon by plaintiff do not support the proposition that damages can be recovered without proof of what pecuniary loss has been suffered as a result of discrimination."

Judge Rudkin: Suppose the legislature of California had prescribed \$1 per hundred from here to Los Angeles and you charged \$2 per hundred, could not the party recover it back?

Mr. Booth: Assuming that the rate was proper, and accompanied by due process.

Judge Rudkin: That is practically what the constitution does in this case, and that is what the other side claims.

Mr. Booth: Yes, sir. If, in fact, the rates contended for here were in excess of the lawful rate, we do not claim that an action for overcharge cannot be maintained; but we claim that to take the isolated section of the constitution, select it out of the body of the constitution, as contended for by counsel and give it counsel's construction, is to utterly

disregard the other section of the constitution, equally as mandatory and equally as prohibitory as that section. So far as there being no attempt by the commission to fix these rates after October 10, 1911, counsel, I think, misunderstands our position in that regard. The amended section of the constitution expressly says that the Eshleman act—the then Railroad Commission act passed in 1910—shall be construed as though it had been passed after the adoption of the amended section—a remarkable example of a constitutional section, so to speak, swallowing a statute whole. That is explained in the briefs. There is a contemporary history which explains why they did that, why the constitution was so framed. At any rate, it was done. The Supreme Court of California has said that it is competent for the legislature to pass any section not inconsistent, and so forth. The long and short haul clause is contained in the constitution adopted October 10, 1911, together with the other two provisions, that the commission may establish rates, and so on. According to the rule of construction laid down by the constitution, itself, we must construe the Eshleman act as though it had been passed after the adoption of the constitution. The Eshleman act says that the commission may establish rates. Suppose on October 10, 1911, a new railroad had been opened up and it became necessary, of course, under the statutes, for that railroad to have rates on file, a published tariff rate available to everyone and observable by everyone; suppose that a new railroad had come to the commission and said, “We want you

to establish rates." Unquestionably, under the Eshleman act, they would have had the power to establish the rates. Suppose they had established those rates without having a hearing, or taking evidence on the long and short haul question? The Eshleman act permits them to do that. I have called attention to the section in the brief. I think it would not be available as a defense, either by the carrier or as a ground of action by a party-litigant to say that those rates were not legal rates because the long and short haul section had not been subjected to an application by the carrier for permission to deviate, and a hearing, and due process of law, and all of its concomitants, by the commission. That is the point I was making. The other points I shall try to cover in my brief.

(Copy of Decision No. 2884.)

BEFORE THE RAILROAD COMMISSION OF
THE STATE OF CALIFORNIA.

Case No. 878.

FRESNO TRAFFIC ASSOCIATION, a corporation,

Complainant,

vs.

SOUTHERN PACIFIC COMPANY, et al., a corporation,

Defendants.

M. K. Harris and F. M. Hill, for Fresno
Traffic Association;

C. W. Durbrow for Southern Pacific
Company;

E. W. Camp for Atchison, Topeka &
Santa Fe Railway Company.

Loveland, Commissioner:

Opinion

In this complaint reparation is asked under the provisions of the Constitution of California and the Public Utilities Act, for charging a greater sum for a short haul than for a long haul when both hauls are in the same direction and over the same rails.

The complaint alleges that certain shipments were made by certain business firms, members of the Fresno Traffic Association, complainant, over the

rails of the defendant carriers from San Francisco to Fresno, upon which a rate, violative of the provisions of the long and short haul clause of the Constitution and of the Public Utilities Act, was charged and collected. These shipments are set forth in the complaint as follows:

On the 24th day of August, 1914, shipment by the Western Sugar Refining Company, San Francisco, via Southern Pacific Company to the San Joaquin Grocery Company, Fresno, California, of sugar weighing 55,550 lbs., on which the rate of 25 cents per hundred pounds was charged, total amounting to \$138.88, whereas complainant claims rate of $22\frac{1}{2}$ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 30th day of March, 1914, shipment by the Western Sugar Refining Company, San Francisco, via Southern Pacific Company to the San Joaquin Grocery Company, Fresno, California, of sugar weighing 51,493 lbs., on which the rate of 25 cents per hundred pounds was charged, total amounting to \$128.73, whereas complainant claims rate of $22\frac{1}{2}$ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 15th day of September, 1914, shipment by the A. S. Company, San Francisco, via Atchison, Topeka & Santa Fe Railway Company to the San Joaquin Grocery Company, Fresno, California, of canned fish (sardines) weighing 40,880 lbs., on which the rate of $27\frac{1}{2}$ cents per hundred pounds was charged, total amounting to \$112.42, whereas com-

plainant claims rate of $22\frac{1}{2}$ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 26th day of May, 1915, the Luckenbach S. S. Company delivered to the Southern Pacific Company at San Francisco, consigned to the Inland Iron Company at Fresno, California, a shipment of horse shoes and calks weighing 50,400 lbs., on which the rate of 31 cents per hundred lbs. was charged, total amounting to \$156.24, whereas complainant claims rate of $27\frac{1}{2}$ cents, being the rate from San Francisco to Los Angeles, should have been charged and collected.

On the 21st day of March, 1914, the Inland Iron Company, San Francisco, caused to be delivered to the Southern Pacific Company, consigned to the Inland Iron Company, Fresno, California, a shipment of angle, hoop and bar iron, weighing 84,400 lbs., on which the rate of 31 cents per hundred pounds was charged, total amounting to \$261.64, whereas complainant claims rate of $27\frac{1}{2}$ cents, being rate from San Francisco to Los Angeles, should have been charged and collected.

On the 13th day of August, 1915, shipment by the Pacific Coast Steel Company, South San Francisco, via Southern Pacific Company, to the Inland Iron Company at Fresno, California, of steel bars, weighing 70,870 lbs., on which the rate of 31 cents per hundred pounds was charged, total amounting to \$219.70, whereas complainant claims the rate of 15 cents, being the rate from South San Francisco to

Los Angeles, should have been charged and collected.

The complaint further alleges that the defendant carriers "have not been authorized by the Railroad Commission of the State of California to charge less for the transportation of shipments of the character specified in the complainant's petition for a longer distance than for a shorter distance, and that said railroad commission has never, after investigation, authorized defendants by any order to charge less for transporting shipments over said longer distance than over said shorter distance, and has never, after investigation, granted any application of defendants, or either of them, to be relieved from the provisions of the Constitution of the State of California, forbidding railroads to charge less for hauling shipments over longer than over shorter distances"; and prays for judgment against defendant carriers in the sum of \$207.76 and for interest on each excessive charge alleged to have been made by defendants at the rate of 7% from date of payment.

At the hearing it was agreed by counsel for defendant carriers that the statement of Mr. F. M. Hill, manager of complainant, would be accepted that the said shipments were made and that claims for reparation upon said shipments were assigned to complainant. The sole question, therefore, to be decided in this proceeding is whether the carriers violated the provisions of the long and short haul clause of the Constitution and Public Utilities Act in as-

sessing and collecting higher rates on said shipments between San Francisco and Fresno than the carriers collected on similar shipments between San Francisco and Los Angeles, or whether any action taken by the Railroad Commission of the State of California, hereinafter designated as the Commission, relieved the defendant carriers from the obligation of observing the long and short haul provisions on said shipments.

To set forth clearly the grounds upon which the decision in this case is based, a history of such action as has been taken by this commission, with reference to the long and short haul clause, follows:

Section 21 of Article XII of the Constitution of 1879 of this State contained a long and short haul clause. On October 10, 1911, this section was amended so as to provide that "upon application to the Railroad Commission provided for in this Constitution, such company may, *in special cases, after investigation*, be authorized by such commission to charge less for longer than for shorter distances for the transportation of persons or property."

On October 26, 1911, the commission served notice on all carriers to file with the commission on or before January 2, 1912, a complete list of each rate or charge not in conformity with the long and short haul clause, in every case in which the carrier desired to continue to deviate from the long and short haul clause. This time was afterward extended to February 15, 1912.

Some of the carriers having filed their petitions for relief from the provisions of the long and short haul clause, the commission, on January 2, 1912, held a hearing upon the petitions.

On February 15, 1912, the commission issued an order authorizing the carriers to continue deviations from the long and short haul clause until the petitions had been finally passed upon by the commission.

Previous to said order of February 15, 1912, an extended investigation was made by the Rate Department of the commission, under the commission's instructions and supervision, with reference to the deviations from the long and short haul clause, on the part of the carriers, including the defendants herein, as shown by said petitions.

The evidence in this proceeding shows clearly that the investigations thus conducted by the Rate Department were extended and exhaustive, and that frequent conferences on this subject were held, as the investigation proceeded, between the commission and its Rate Department, prior to the order of February 15, 1912. This investigation, as shown by the evidence herein, covered not merely the general subject, but also was specifically directed to the individual deviations shown in the petitions of the carriers. The order of February 15, 1912, was based upon these investigations.

Complainant's claims in this proceeding are accordingly without merit.

As this commission has, after investigation, authorized the carriers, pending the further order of the commission, to continue the deviations from the long and short haul clause herein involved, and as the question of the violation of the long and short haul clause is the sole basis for the claim to reparation herein, the complaint should be dismissed.

I submit herewith the following form of order:

Order

A public hearing having been held in the above-entitled proceeding, and the case having been submitted and being ready for decision,

It is hereby ordered that the complaint in the above-entitled proceedings be and the same is hereby dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 8th day of November, 1915.

(Seal)

MAX THELEN,
H. D. LOVELAND,
ALEX. GORDON,
EDWIN O. EDGERTON,
FRANK R. DEVLIN,
Commissioners.

A true copy:

H. G. MATHEWSON,

*Assistant Secretary Railroad
Commission State of Cali-
fornia.*

No. 2643

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

SOUTHERN PACIFIC COMPANY, a corporation, vs. CALIFORNIA ADJUSTMENT COMPANY, a corporation, <i>Defendant in Error.</i>	<i>Plaintiff in Error,</i>
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Supplemental Brief by Plaintiff in Error

By way of supplement to the oral argument we desire to add that which lack of time prevented counsel from presenting orally.

I.

Throughout the brief and argument of defendant in error appears the assumption that the lesser rate for the greater distance is a matter of choice on the part of the railroad carrier and because "voluntary" on its part affords an additional reason why that rate should be applied as a maximum at intermediate points.

The case of *Louisville & Nashville Railway Co. vs. Walker*, 110 Ky. 961 (63 S. W. 20), cited by counsel

(p. 53, Dft. in Error, Brief) was possibly in his mind. That decision says (p. 965, 110 Ky.):

“The carrier is allowed by the Constitution to fix the rate for the longer haul, but when he so fixes it this rate is the limit beyond which he cannot go in charging for the same service in the shorter haul.”

Counsel's assumption is erroneous. The carrier has no control over the through rate, even under the long and short haul idea. The through rate is involuntary. Under the Fourth Section of the Interstate Commerce Act, as amended in 1910, the through interstate rate where it is less than intermediate rates is fixed by the commission irrespective of what rate the carrier proposes. Under both the California Constitution of 1879 and the Eshleman Act the through rate between points in California is fixed by the Commission—a state-made rate. Under the California Constitution, as amended October 10, 1911, as supplemented by the Eshleman Act, the through California intrastate rate is still fixed by the commission without the carrier's initiation or consent, subject only to Federal constitutional guaranties.

Thus the through rate, which counsel, by isolating a sentence of but one of the applicable constitutional provisions, seeks to apply as an absolute measure of all intermediate rates, is a rate beyond the control of the carrier. Take, if you please, the situation between San Francisco and Los Angeles—a 27½-cent per 100-lb. through rate for a certain class of commodities—say rice. The carrier could not either be-

fore or after the amendment of October 10, 1911, refuse to carry between Los Angeles for that and nothing more or less, without subjecting itself to the drastic penalties enforceable during both periods. If not confiscatory—and confiscation will not be presumed—it was a lawful rate even under the theory of defendant in error, both because no lesser rate existed to a point beyond, and because the commission had established and promulgated it. Assuming, then, as we think must be assumed, that the $27\frac{1}{2}$ -cent rate on rice from San Francisco to Los Angeles (rate pleaded in Count No. 119, Complaint, Record Vol. 2, p. 328) was a legally chargeable rate on that commodity for the through haul, because it was commission-established and because no lower rate on rice existed from San Francisco to a point beyond Los Angeles, what then was the carrier's situation? The commission had established, as we offered to show, the rate of 36 cents per 100 lbs. on rice from San Francisco to Fresno, a point intermediate San Francisco-Los Angeles, upon the collection of which Count 119 is based (Record Vol. 2, p. 328). Claims defendant in error the $27\frac{1}{2}$ -cent rate was the lawful rate to Fresno as well as to Los Angeles, because we were then, under the compulsion created by the commission-made rate, charging $27\frac{1}{2}$ cents for the longer haul.

Suppose we concede, for the sake of argument, that the claimant's contention is correct as to that one intermediate rate. Suppose the through Los Angeles rate on rice applies to Fresno, though the Commission had said otherwise, and in perfect good

faith we had collected and Kamikawa Bros., plaintiff's assignor, had paid the 36-cent rate. Let us suppose then that Kamikawa Bros. on the same day had made a similar shipment of rice to Bakersfield, and that the commission-established San Francisco-Bakersfield rate had been 35 cents. Under counsel's theory they also on the Bakersfield movement would be entitled to the difference between $27\frac{1}{2}$ cents and 35 cents, which would make the rate on rice from San Francisco to both Fresno and Bakersfield, 107 miles apart, $27\frac{1}{2}$ cents per 100 lbs., the through Los Angeles rate. This, counsel contends, would be the lawful rate for the movement, no matter what the commission might say, except upon an application to and investigation by it after October 10, 1911, and from which the Commission had no power to deviate prior to October 10, 1911, as counsel claims that there was nothing in the Constitution of 1879 tantamount to a relieving clause.

Then, if counsel be correct, the $27\frac{1}{2}$ -cent rate would still apply to Mojave, 68 miles south of Bakersfield and 175 miles south of Fresno. So that whatever might be the judgment and order of the commission as to competitive conditions, operating difficulties or any other of the elements of rate-fixing, the railroad might charge for hauling rice from San Francisco to any point between it and Los Angeles $27\frac{1}{2}$ cents per 100 lbs. because that is the San Francisco-Los Angeles rate, and because by so charging it would not be exceeding the rate to the more distant point, whether that point be Fresno, Bakersfield, Mojave or Los Angeles. The through

rate is claimed to be a non-elastic measure; the commission-made intermediate rates pass away; nothing is left to regulation but the through rate. This must be so, because it cannot be presumed that in fixing $27\frac{1}{2}$ cents to Los Angeles and 36 cents to Fresno the Commission had in mind any other than 36 cents to Fresno. If the carrier then were obligated to charge not 36 cents but "charges not exceeding" (Const. XII, 21) $27\frac{1}{2}$ cents to Fresno, it might charge 25 cents to one, and 26 cents to another, perhaps leaving the shipper to a remedy before the commission for discrimination between shippers at Fresno, but throwing the San Joaquin Valley rate structure into chaos. And further, if, under counsel's contention, $27\frac{1}{2}$ cents measures the intermediate maximum rice rate at points intermediate San Francisco and Los Angeles, the 36-rate at Fresno and the 38-cent rate at Bakersfield pass away, and the carrier may charge 27 cents at Fresno, and $27\frac{1}{2}$ cents at Bakersfield, free from control except a possibility of a charge of discrimination between the two communities.

This same illustration can be made as to each count in the complaint.

Counsel's contention would force upon the commission prior to October 10, 1911, the duty of fixing a reasonable rate between terminals, which are in California almost always competitive points, and then either shading the through rate each way, or establishing it as a fixed rate at each intermediate station. It must be remembered that under the Cali-

fornia system, both before and after October 10, 1911, the commission-fixed rates are not mere maxima. They are absolute rates, not to be departed from except under heavy penalties, recoverable by the State.

If our claim be true that the commission-established rates were valid on October 10, 1911, it follows that if counsel's claim be correct that a new rule was then made, we would have the situation on October 10, 1911, that there were no rates save those which the carrier saw fit to charge, subject only to the mandate that no less should be charged for the longer than for the shorter haul. That this claim was foreseen by the draftsman of the amended Section 22 of the Constitution is shown by the provision that the Eshleman Act was continued in force, and that it have the same force and effect as though it had been passed after the amendment and by Section 18 of the Eshleman Act it is stated:

“All rates of charges for the transportation of passengers and freight, and all classifications established by the commission shall remain in effect until changed by the commission.”

The framer of the amendment to Sections 21 and 22 well knew that for more than thirty years the long and short haul, non-penal, clause of the Constitution of 1879 (Art. XII, Sec. 21) had been treated by the public, the commission and the carriers as controlled by the provision in Section 22 giving the commission power to fix rates, making those rates conclusively just and reasonable, and imposing se-

vere penalties on carriers for deviating therefrom. Likewise he well knew that the commission had established thousands of rates prior to October 10, 1911, in which the long and short haul principle was not observed.

We have shown that both the old and the new California constitutional provisions respecting the fixing and collection of railroad rates, as well as the series of Legislative acts intended to supplement those provisions and carry them into effect, consistently declare that the carrier shall not collect or receive any greater, less or different compensation for services performed than that established by the commission. In other words the California system absolutely negatives any theory of maximum rates and gives the carrier no right to vary from the rate fixed by the commission. But counsel says that the rate, for instance, on rice from San Francisco to Fresno, is not 36 cents, the only rate on rice for that haul one can find in the tariffs established by the commission, but that the carrier should charge not more than 27½-cent Los Angeles rate. It would necessarily follow, therefore, that there is no rate on rice from San Francisco to Fresno, since if the commission's established rate of 36 cents is an illegal and unlawful rate, the carrier has no means of determining what rate the commission would have established if it had been absolutely bound, as claimed by counsel, to fix a rate to Fresno at not more than any rate to a point beyond Fresno on the same line or route in the same general direction. This position in its last analysis would mean that

there are no rates in the San Joaquin Valley which the carrier is bound to observe, and that the carrier may charge any sum it pleases so long as it does not exceed the confessedly legal through rate between San Francisco and Los Angeles (which we say is confessedly legal because it is no more than that to any point beyond), and so long as it does not lay itself open to the charge of discrimination as between persons or communities, the rights of which must be asserted by application to the Railroad Commission and must, preliminarily at least, be redressed by that body. In other words counsel's theory substitutes for the presumably consistent and harmonious system of through and intermediate rates contemplated by the California Constitution and statutes, a system of rates made by the commission between terminals which cannot be deviated from without penalty, but which as to points between terminals need be observed by the carrier only as maximum rates.

Hence, having in view the evident care to make the Eshleman Act of 1910 an integral part of the amendment, it is fair to say that, in view of the utter confusion that would result if immediately and automatically on the adoption of the amendment all rates in violation of the long and short haul clause were made illegal, necessitating application, investigation and relief if competitive conditions at the more distant point were observed, the framer of the Act had in mind the provisions of Section 18 of the Eshleman Act that the rates which had been "es-

tablished by the commission shall remain in effect until changed by the commission.”

This construction, which is a reasonable one, necessitates no relieving orders by the commission; it needs no new establishment of rates; it merely preserves in effect existing commission-established rates, and herein both counsel and the learned District Judge, we respectfully submit, missed the significance of this point, which we endeavored to preserve by separate defense as well as by offer of proof.

How illogical, not to say unfair, appears the contention of defendant in error when it seeks recovery by using as a subtrahend a state-established rate, a rate the reasonableness of which might only be questioned by proceedings before the commission by any community, person or carrier affected; a rate the sanctity of which was not violable by the carrier except under pain of severe penalties; a rate clearly not inhibited by the long and short haul clause. And, seemingly by way of apology, we are told that this through rate, beyond our control, should govern recovery because we might either have raised it or have reduced the intermediate rates. That the former was commercially impossible, even if the commission had so authorized, is pleaded; that the latter would be confiscatory is also pleaded. (Separate Defense I, Record p. 337, to which demurrer was sustained.)

Further, counsel characterizes the rates established by the California commission in violation of a claimed inflexible long and short haul principle as “unlawful” and “illegal” and other epithets that

add nothing to argument. But if the commission flew in the face of the isolated second sentence of the old Section 21 which counsel carefully carves out of the section to save it from unconstitutionality; if this selected sentence is "mandatory and prohibitory" standing alone, despite that the obligation on the carrier to charge the rates fixed by the commission (vide Sec. 22) is equally "mandatory and prohibitory"; or, to be specific, if the commission orders, as it did here, a 27½-cent rate on rice from San Francisco to Los Angeles and a 36-cent rate on the same rice from San Francisco to Fresno—which rate was the carrier to treat as illegal and unlawful? Counsel says the greater rate to the lesser distance. The rate greater than what? Counsel would say than the Los Angeles rate. But that rate was an integral part of a rate scale established by the commission—a scale which presumably counterbalanced competitive and operating conditions, so as to give the carrier a reasonable remuneration for the "selected commodity or class of traffic." (*Norfolk & Western vs. West Virginia*, 236 U. S. 605.) We think counsel's position untenable. The State, having delegated to a rate-fixing body the power to regulate rate structures, cannot, by casuistic construction of constitutional provisions and by ignoring the rule requiring such provisions to be construed *in pari materia*, "eat its cake and have it, too."

If the railroad shall not charge more for the shorter than for the longer distance, irrespective of competitive conditions and without power of relief

by court or commission, except where the Federal Constitution is violated, can the avid shipper select a through rate and stand on it and apply it to measure all intermediate rates? Irrespective of the civic immorality suggested by such a situation, we say that in the case at bar he cannot do so without infringing the Federal Constitution.

Our record here is sufficient on that point. We pleaded that the through rate was water-compelled and less than reasonable for the service performed, and that the intermediate rates collected were reasonable and if reduced to the level of the through rate would be less than reasonable. (1st Separate Defense, Record Vol. II, pp. 337-8-9.) The trial court (Record Vol. II, p. 356) sustained a general demurrer to this defense.

Surely it cannot be that, aside from our general constitutional point that we could not be forced, at least in the absence of a hearing to establish these less-than-reasonable intermediate rates, we are placed in the position where a shipper can apply a less-than-remunerative rate to a given class of traffic, without consent on our part, without due process of law, and in the face of adverse action by a duly constituted state tribunal.

Nor can the State Constitution accomplish this unjust and confiscatory result merely by its say-so, and even though a sentence culled from a number of others may on the "mandatory and prohibitory" argument be given such a first impression construction.

Counsel's construction of the old Constitution means, in its last analysis, that where rates were, as he would term it, "ostensibly established" by the commission, and the scale of rates so established violated his selected, non-penal, long and short haul clause, the whole rate scale would be void, because it cannot be argued that such rates were not, in the mind of the commission, interdependent, and, one portion thereof being void, the whole would fall. The result would be that, in spite of the elaborate and adequate scheme of rate regulation created by Constitution and statute, we never have had in California, up to this day, any commission-made rates where the rate structure involved a greater charge for a lesser distance, except where, since October 10, 1911, the commission (according to counsel's contention), after formal application by the carrier and upon an investigation and hearing corresponding to the procedure in a court of record, promulgated a scale of rates on a certain line of railroad where the long and short haul principle was not observed. At least in the absence of such formal proceeding counsel would have us believe that we have had no commission-made rates except through rates.

It is not, therefore, a *reductio ad absurdum* to say that if counsel's position be correct the California carriers since October 10, 1911, have been and are now, save where such formal application, investigation and rate fixation have been had, free to charge what they please within California, so long as they

do not violate the isolated clause which is relied upon as the Magna Charta of the defendant in error.

The difficulties we have suggested as arising from the extreme positions taken by defendant in error vanish when are considered *seriatim* the points we make that:

1. The old long and short haul Section 21 of Article XII was unconstitutional in whole, as an interference with interstate commerce.

2. If not void in its entirety it should be construed with Section 22 so as to allow the commission to establish rates in deviation from it, because:

- (a) To give it an inflexible operation so as to compel carriers to haul at a less than reasonable rate would be violative of the 14th Amendment; and

- (b) It can at best be construed only as a rule coupled with a relieving power given the commission by Section 22 to establish conclusively just and reasonable rates.

3. Therefore the rates fixed by the commission prior to October 10, 1911, and evidenced by tariff on that date were continued in force after October 10, 1911, and until changed by the commission, because:

- (a) The Eshleman Act, adopted by the amended sections, expressly says so.

- (b) To hold otherwise would be to give the long and short haul clause in the amended section an immediate operation without notice or hearing as to rates which, as here pleaded, are confiscatory.

4. That irrespective of the operation of the Eshleman Act as a part of the amended sections, the rates collected by plaintiff in error after October 10, 1911, were legal rates, because

(a) The commission had the power to continue them in effect, and *sua sponte* did so by formal order; and

(b) The commission did expressly relieve the carrier as to all of the collections here involved, save those between October 10, 1911, and November 20, 1911.

Throughout the contentions made by defendant in error in this case there runs the error of attempting to treat the powers of the Interstate Commerce Commission and the powers of the California Railroad Commission as identical with respect to fixing rates. That this is an error, and that it materially impairs the analogy counsel seeks to draw between the Interstate Commerce Commission and Federal decisions and the California situation, is quite apparent when we consider the provisions of the California Constitution and the California Acts.

Section 22, Article XII, California Constitution, as it existed prior to October 10, 1911, gave the commissioners the power and made it their duty to establish rates of charges for railroads, which rates were declared to be conclusively just and reasonable.

Section 22, as amended October 10, 1911, gave the commission power to establish rates of charges, and provided that no railroad company should charge a

greater, less or different compensation than the rates established by the commission.

Section 18 of the Eshleman Act, effective February 10, 1911, and expressly continued in force and made a part of the amended sections of the Constitution, and so remaining in effect until March 23, 1912, expressly gave the commission power to fix rates for transportation.

Under the decision of the Supreme Court in *Pacific Telephone & Telegraph Co. vs. Eshleman*, 166 Cal. 640, it was clearly competent for the Legislature to absolutely vest the rate-fixing power in the commission, irrespective of any limitations of the Constitution. Counsel argues that such vesting should not be inconsistent with the constitutional powers conferred upon the commission, and that to allow the commission to fix rates after October 10, 1911, and in violation of the long and short haul clause would be inconsistent with the clause in the Constitution; but this does not follow under the decision of the California Supreme Court above referred to, which holds that the section with regard to unconstitutionality only means that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, and that the legislative authority to confer any kind of additional powers is plenary and unlimited by any constitutional provision; and further, that this was designed and delivered to the end that the Railroad Commission should have its labors unvexed and its results untrammelled by the courts of the State. The discus-

sion of this phase of the powers of the commission under legislative enactments adopted after the passage of the amended Sections 21 and 22 may be found beginning at page 654 of 166 California Reports.

In the case of the Interstate Commerce Commission the situation is entirely different. (Drinker on Interstate Commerce Act, Vol. I, Sec. 270.)

One of the most important questions under the Act to Regulate Commerce, as it stood prior to the amendment of 1906, was whether the commission had power to prescribe maximum rates which carriers might charge in the future. The commission was not in terms given power to fix rates for the future, but was only required to enforce the provisions of the Act, which, among other things, provided that all rates should be reasonable.

The commission held, in *Perry vs. Florida etc. Railway Co.*, 5 I. C. C. 97:

“It is not, of course, asserted that the Act confers on the commission the general power to prescribe the traffic charges of carriers subject to its provisions. The general scope of the Act, as well as its specific provisions as to complaints to and investigations by the commission, forbids such an interpretation.”

But the commission did hold that, after a complaint had been made or an inquiry had been instituted by the commission, it was not restricted simply to finding the fact and forbidding the carrier to continue to charge the existing rate, but that it might go farther and enforce a reasonable rate.

The Supreme Court first discussed this question in the Social Circle case (*Cincinnati etc. Railway Co. vs. Interstate Commerce Commission*, 162 U. S. 184), and there intimated, without deciding, that the Act gave the commission no power to fix rates. Several circuit courts followed this dictum in a number of cases (74 Fed. 70; 74 Fed. 715; 74 Fed. 784; 76 Fed. 183), but the Supreme Court, in *Interstate Commerce Commission vs. Cincinnati etc. Railway Co.*, 167 U. S. 479-511, decided definitely that the commission had no power to prescribe rates which should control in the future, and that it could not, therefore, invoke from the courts a peremptory order to enforce any such tariff by it prescribed. Mr. Justice Brewer makes this clear, at the end of the opinion.

A number of later cases follow this decision, among which are *Interstate Commerce Commission vs. Alabama etc. Railway Co.*, 168 U. S. 144, and *Interstate Commerce Commission vs. Southern Pacific Co.*, 132 Fed. 829.

After the decision in *Interstate Commerce Commission vs. Cincinnati etc. Railway Co.*, 167 U. S. 479, the amendment of 1906 to paragraph 1 of Section 15 of the Act to Regulate Commerce was given effect. This gave the commission express power to determine, after hearing or complaint, what are reasonable rates for the future, and to require the observance of such rates. As to that section, the author of *Drinker on Interstate Commerce* says, in Section 273:

“In a number of the Federal cases above cited, holding that prior to this amendment the commission had no such power, the decision was rested on the ground that to prescribe rates for the future was a legislative and not a judicial act, and therefore one which the commission could not perform. If this be entirely true, there would seem to be some doubt as to the power of Congress to delegate a strictly legislative function to a quasi-judicial body. It is submitted, however, that there is a clear distinction between the prescribing of rates generally without any complaint, controversy or special investigation, and directing the observance of a certain particular rate or schedule, after judicial investigation of its propriety. It might well be that Congress would not have power to constitute the commission a general manager for all the railroads in the country, or to give it authority to evolve rate schedules for all lines out of its own consciousness, but the commission does not and never has claimed such extensive power. Congress would seem clearly to have power to authorize it to enforce the provisions of the Act by ordering compliance with rates, which, on investigation, it judged reasonable. In so doing it acts not in a legislative but in a judicial capacity.

It will be noted that Section 15 does not expressly authorize the commission to fix rates in a proceeding instituted on its own motion, but only after full hearing on complaint filed.”

It is clear, therefore, that the Interstate Commerce Commission has not the power *sua sponte* to fix rates for carriers subject to its jurisdiction,

but that this power can only be invoked by application of the carrier or by a complaint made before the commission, in both of which cases notice, with opportunity to produce witnesses and testimony, is necessary. This applies even in the case of a carrier desiring to deviate from the long and short haul clause of the Interstate Commerce Act, but only when the extent of the deviation proposed by the carrier is not acquiesced in by the commission. In other words, the carrier's rates being primarily carrier-made rates and not commission-made rates, if the carrier files a tariff with the commission, which deviates from the long and short haul principle, the commission is satisfied with the tariff as it stands the tariff is filed and goes into effect at the expiration of the statutory period of notice. If the commission does not approve of some or all of the deviations proposed, it places the tariff on what it terms its Investigation and Suspension Docket, holds a hearing, and gives a decision which may or may not give the carrier the full measure of variation from the long and short haul principle to which it feels that it is entitled by reason of competitive conditions at the more distant point.

The volumes of the reports of the commission since the adoption of the long and short haul clause in 1910 are replete with illustrations. This qualification should be observed, that when a carrier applies to the Interstate Commerce Commission for permission to deviate from the long and short haul clause, and the commission finds that some reason exists for the deviation, and establishes the rate to

the more distant point, it need not establish it at the rate proposed by the carrier. This power of the commission, whether exercised or not, makes the long haul rate a commission-made rate, even though it be the same rate as that proposed by the carrier.

In thus claiming that the California rates are made under a system which vests the right to initiate them in the commission and not in the carrier, as distinguished from the Interstate Commerce Act, I do not mean to say that the California Commission has or ever had the power to fix rates which are confiscatory or which do not afford the carrier due process of law, if the carrier sees fit to complain that either of those constitutional guaranties is not being observed; but where the California Commission fixes a scale of rates, though it may be confiscatory in effect, and though no notice may have been given or hearing had, it is manifestly binding on the public because the public agency has fixed it, and it is equally binding on the carrier unless the carrier, by judicial review, seeks its annulment or change. There also runs with this fixation the remedy provided by the California Act, under which the commission itself may reopen the question and institute an investigation, or the carrier may file a complaint and ask for a hearing, or any person or community affected may likewise file a complaint and ask for a hearing, whereupon notice must be given to the carrier.

The utter confusion in counsel's argument arises from the fact that he has failed to recognize the radical distinction between the method of fixing in-

terstate rates and the method of fixing California intrastate rates. The former are carrier-initiated and in most cases carrier-established maximum rates. The latter are commission-initiated and established, and are not maximum rates, but are moving rates—that is, rates which cannot be deviated from by the carrier, and which the carrier must evidence by tariffs filed with the commission within the time specified in the rate-fixing order, if such tariffs are not already on file. Of course in the case of interstate rates the maximum character of the rates does not dispense with the necessity of filing tariffs; the order always is that the carrier shall file tariffs within a certain time at not to exceed the rate specified in the Interstate Commerce Commission order, and it may file tariffs at less than such rates, where conditions appear to justify it.

To summarize: under the Interstate Commerce Act tariffs are merely evidence of rates which the carrier has proposed and the commission acquiesced in, or which the commission has ordered; under the California system, old and new, tariffs are merely evidence of rates which the commission itself has established.

Apropos of counsel's remark at the oral argument, that the California Commission had tried by its Decision No. 2884 of November 8, 1915, to "bolster up" its relieving orders, it may be remarked that the California Commission is given by the California constitutional and statutory provisions, all the power that any commission act has

ever conferred and powers far in excess of those possessed by the Interstate Commerce Commission.

As said by the Supreme Court in considering an order of the Interstate Commerce Commission, a body whose functions, as we show, are much more limited than those of the California Commission:

“(p. 470) Power to make the order, and not the mere expediency or wisdom of having made it, is the question.”

I. C. C. vs. Illinois Central, 215 U. S. 455.

And in *I. C. C. vs. Union Pacific*, 222 U. S. 541 (p. 547):

“There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided it has been settled that the orders of the commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the commission had acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exer-

ercise of the power. *I. C. C. vs. Illinois Central*, 215 U. S. 452, 470; *Southern Pacific vs. I. C. C.*, 219 U. S. 433; *I. C. C. vs. Northern Pacific*, 216 U. S. 538, 544; *I. C. C. vs. Alabama Midland*, 168 U. S. 144, 174.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the commission are made by law *prima facie* true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' *Illinois Central vs. I. C. C.*, 206 U. S. 441. Its conclusion, of course, is subject to review, but when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

The California Commission's Decision No. 2884, was made in a contested case, and clearly speaks for itself.

II.

There can be no question that a state has the power to regulate rates on railroads for movements beginning and ending within its borders, provided always that such regulation, either in its manner,

as by lack of due process of law, or in its effect, as in cases of confiscation and interference with interstate commerce, does not infringe the provisions of those or other sections of the Federal Constitution.

What we now have to say as to the competitive situation between San Francisco and Los Angeles, is not in challenge of the state's right to regulate that situation, if it do so competently, but to the point that the construction of certain sentences of the state system insisted on by counsel for defendant in error is manifestly incompatible with the general system of state-made rates contemplated by both the old and the new sections of the California Constitution.

If your Honors will look at a map showing the rail lines in California between San Francisco and Los Angeles, you will see that the Southern Pacific Company has a direct line through Fresno, Bakersfield and Mojave, and another line, of practically the same mileage, through Salinas, San Luis Obispo and Santa Barbara. The Santa Fe, which virtually parallels the Southern Pacific from San Francisco Bay to Bakersfield, at Mojave trends eastward and runs through Barstow and San Bernardino in its course to Los Angeles. The Southern Pacific also has a line from Los Angeles eastward, which passes through San Bernardino.

The Southern Pacific is compelled by the State commission, as we offered to show and were not permitted to show, to put in certain through rates, in-

cluding a rate of $27\frac{1}{2}$ cents per hundred pounds on rice from San Francisco to Los Angeles. This compulsion, as we pleaded and were not permitted to show, is by reason of an actual water competition on the Pacific Ocean between the port of San Francisco and the port of Los Angeles and the ports immediately adjacent thereto. It is true that we pleaded that this is a less than reasonable rate, but it must be remembered that if we challenged the $27\frac{1}{2}$ rate to Los Angeles and secured a higher rate from the commission, we would have to go out of the rice-hauling business between San Francisco and Los Angeles, just as we would have to go out of the business of hauling all other commodities between San Francisco and Los Angeles which could be transported by water at a lesser rate than that established by the commission.

But the Santa Fe commission-made rate on rice between San Francisco and Los Angeles, a considerably greater distance than by Southern Pacific, is exactly the same as the Southern Pacific rate— $27\frac{1}{2}$ cents. This comes about because of the well-known rule in rate-making that the conditions obtaining on the shorter line fix the rates for transportation between the same points on the more circuitous route—in this case the Santa Fe—and even when rail carriers are free to fix their own rates, the longer line must meet the rate of the shorter line or go out of business.

Also, where commissions fix the rates, it is customary, as is the case in the instance of every com-

modity moved between San Francisco and Los Angeles by rail, that the commission, as to the Santa Fe, which is the longer and more circuitous route, must fix the Santa Fe rates between San Francisco and Los Angeles on a given commodity at least as low a figure as those fixed for the Southern Pacific, because otherwise the Santa Fe could move no traffic. Traffic, like water, flows along the line of least resistance, and granted that the facilities are equal, the line of least resistance is defined by the lowest rates. That is so true in railroad rate-fixing as to be axiomatic.

According to the contention of the defendant in error, the commission-made rate of $27\frac{1}{2}$ cents on rice is applicable to the Southern Pacific and the Santa Fe as the maximum rate at all points on each line intermediate San Francisco and Los Angeles. That would result in a consignee at San Bernardino being deprived of the real competitive advantages to which San Bernardino is naturally entitled, because, the Railroad Commission having established a rate of $27\frac{1}{2}$ cents over the Santa Fe on rice to Los Angeles, that rate, according to counsel, would automatically apply as a maximum to San Bernardino. At the same time, the Southern Pacific Company would be obliged to charge the same consignee, if he ordered his rice shipped over the Southern Pacific lines, the commission-made rate of $27\frac{1}{2}$ cents to Los Angeles, which is unchallenged here, plus the commission-made established local rate over the Southern Pacific line from Los Angeles to San Bernardino.

The result would be that the Southern Pacific would be driven out of the San Bernardino rice business, and San Bernardino would thereby be deprived of competition between the two points, which competition consists not only in the cost of carriage but also in the efforts of competing companies to secure for and hold business to their lines by superior facilities, expedition of transportation, and all of the other elements of service, which, under our modern theory of rate-making, afford competing carriers the only way of gratifying customers and holding their patronage, rebates and secret preferences having been stigmatized and forbidden. We give this illustration in support of our theory that under the old sections of the Constitution the provision in Section 22, Article XII, giving power to the commission to fix rates, and making those rates conclusively just and reasonable, must be considered *in pari materia* with the non-penal provision of Section 21, constantly referred to herein as the long and short haul clause, and that unless so construed countless situations occur where a California community is deprived of the advantages of its location on two or more competing lines of railroad.

In actual practice, and for years, the situation described has been regulated by the commission, so that in most cases, unless transportation difficulties are insuperable, a community situated on two lines of railroad has its choice of either line from the originating point, so far as rates are concerned.

It is manifest, then, that not only did the Constitution of 1879, by a proper construction of Sections

21 and 22 *in pari materia*, safeguard the public against the condition we have endeavored to depict, but also that when the Constitution was amended on October 10, 1911, the retention of Section 18 of the Eshleman Act, providing that the rates fixed by the commission should remain in effect until changed by the commission, was intended to preserve the rates then in effect, even though they may have been in violation of an isolated long and short haul sentence, until the commission might readjust any situations that required readjustment, thereupon remodeling the rate structure immediately involved, so as to give full allowance to a community favorably situated, whether its favorable situation were due to water competition or to the presence of two or more competing railroad lines.

Another illustration of the fallacy of the contention of defendant in error in endeavoring to apply the through rate inflexibly as a measure for intermediate rates, may be given by still using the figures for the transportation of rice. The assignor of defendant in error in Count 119 shipped rice from San Francisco to Fresno under a 36-cent rate, which was contained in the tariffs promulgated by the commission. It is claimed that this 36-cent rate was not the rate as to that shipment, but that the rate was 27½ cents, the through Los Angeles rate.

But suppose that the same shipment of rice had originated on the Northwestern Pacific at, say, Santa Rosa. In the absence of a joint through rate between the Northwestern Pacific and the Southern

Pacific from Santa Rosa to Fresno, the rate under obvious and familiar principles of rate-construction would be the sum of the two local rates, the rate from Santa Rosa to San Francisco on the Northwestern Pacific, plus the rate from San Francisco to Fresno on the Southern Pacific. It is manifest that the Southern Pacific Company's proportion of a rate so constructed would be 36 cents from San Francisco to Fresno. Counsel may say that the shipper could ship over the Northwestern Pacific from Santa Rosa to San Francisco, and then, by shipping from San Francisco to Fresno, take advantage of the Los Angeles 27½-cent rate, but that would necessitate the shipper's taking delivery at San Francisco, having a new bill of lading issued, and assuming all of the risks incident to the breaking of a carriage intended to be continuous and the responsibility of transferring his shipment from the Northwestern Pacific's custody to the custody of the Southern Pacific, and making arrangements for this intermediate carriage from the freight-sheds of one company to the freight-sheds of the other in San Francisco. Even if the Northwestern Pacific and the Southern Pacific had a joint through rate from San Francisco to Fresno, the joint through rate whether carrier-established or commission-made would be based on the sum of the local rates as fixed by the commission. The Los Angeles rate from San Francisco would have nothing to do with it.

We have given these illustrations and others to show that the principle contended for by defendant in error would throw the rate situation in Califor-

nia into a state of utter confusion; that it is not at all consonant with the idea of state-made, invariable rates; that it introduces into California rates the theory of maximum rate, which was definitely abandoned by this State in 1879, and that if the maximum rate theory be read into the Constitution and statutes of this State the tariffs established by by the commission are, except as to through rates where no lesser rate exists on the same line made of no avail; that the door is again opened to favoritism and discrimination, both between persons and communities, subject only to the right of the State to impose a penalty therefor, and to the right of the individual to apply to the commission, secure a reparation order on the ground that he has been discriminated against (California Public Utilities Act, §71-a), and then, if the order be not obeyed, to sue on the order.

We think it cannot be supposed that the framers of the Constitution and of the amendments thereof, or the people of California, were so short-sighted and fatuous as to introduce into each of the constitutional sections a single sentence which, standing alone, and given the interpretation counsel seeks to put upon it, would practically destroy the rate publicity and uniformity contemplated by the commission method of fixing rates. We think, therefore, that the California Commission was correct when it said that under a system of state-made rates reparation could not have been contemplated where the carrier had charged the rates established by the

commission. (2 C. R. C., Dec. 635, cited in our opening brief.)

This becomes more significant when we consider that in the case at bar there is not even a pretense that the rates charged were unreasonable in view of the service performed, or that the assignors of the defendant in error had been pecuniarily damaged in any sum.

III.

Beginning at the bottom of page 65 of the brief of defendant in error, its counsel, evidently realizing that it would be futile to contend that there was any right of action at common law, seeks to found his action herein upon the non-discriminatory sections of the California Constitution and statutes, to which he refers at length and which he apparently thinks give a right of action in court by a shipper, without having first applied to the California Commission under Section 71-a of the California Public Utilities Act, and without allegation or proof of damage. He then states, at the top of page 66, that the charging of more for the shorter than for the longer distance is discrimination; that "The statutes of 1909 and 1911 confer a right of action for damages upon any person injured by such discrimination", and that the Public Utilities Act expressly confers a right of action for damages upon any person injured by a violation of the prohibition against charging more for the shorter than for the longer distance. He then says that the complaint states the facts, from which it follows as a matter of law

that damage has resulted and that no evidence in support of those allegations was necessary.

After discussing the cases cited by us in our opening brief, he begins, on page 78, to discuss certain decisions of the Interstate Commerce Commission in which the commission awarded damages without any specific proof of the fact that the complainant had been damaged, or of the amount in which damage had been sustained. *In discussing these decisions by the Interstate Commerce Commission he entirely overlooks the very clear distinction which has been drawn by that commission between applications to the commission based on the charging of an unreasonable rate where the commission has held that the difference between the reasonable rate and the unreasonable rate charged was per se the measure of damages, and the cases where application has been made to the commission, or action brought in the courts, on the ground of discrimination—which counsel admits is his complaint here—and where it has been uniformly held in the later decisions by the commission and by the courts that there must be allegation and proof of actual damage arising by reason of the discrimination, and sustained by the plaintiff or complainant, and that proof of discrimination is not equivalent to proof of damage sustained.*

A few of these cases will serve to illustrate the error into which counsel has fallen, and the soundness of our position that, in any view of the case at bar, the failure to plead and prove damage is fatal to the claims of the defendant in error:

New Orleans Board of Trade vs. Illinois Central Railroad Co., 29 I. C. C. 32; decided January 5, 1914. Says the commission:

“There is nothing in the act to regulate commerce from which a presumption of damage can be inferred, and it has never been so held.

The wording of the act is as follows:

‘Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act, matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier shall be liable to the person or persons *injured* thereby for the full amount of *damages sustained in consequence of any such violation* of the provisions of this act.’

As said in *Parsons vs. C. & N. W. Ry. Co.*, 167 U. S. 447, 460, and quoted in *Pa. R. Co. vs. International Coal Co.*, *supra*, 230 U. S. 200, in construing this section:

‘Before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury.’

And in *Pa. R. Co. vs. International Coal Co.*, *supra*, it is said:

‘Congress had not then and has not since given any indication of an intent that persons not injured might, nevertheless, recover what, though called damages, would really be a penalty, in addition to the penalty payable to the government.’

Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain a recovery before a court of law. *Anadarko Cotton Oil Co. vs. A. T. & S. F. Ry. Co.*, 20 I. C. C. 43, 51.

Mere proof of specific shipments made and the freight paid and the amount for which reparation is sought does not make out a *prima facie* case. Something more is necessary. The complainant must show how the discrimination found to exist affected him to his damage. In other words, he must establish the *fact* of his damage as well as the *amount* of damages he claims."

John Nix & Co. vs. Southern Railway, 31 I. C. C. 145, decided May 4, 1914. The syllabus, which is supported by the decision, states:

"The fact that a carrier has published rates which contravene the long and short haul rule of the fourth section of the Act, without authority therefor, is not of itself a sufficient basis for an award of reparation, in the absence of proof of damage to the shipper."

In *Ballou vs. N. Y., N. H. & H. R. Co.* 34 I. C. C. 120, decided April 12, 1915, the commission again makes clear its distinction between awards based on unreasonable rates and those based on discrimination. In that case the claim was of unreasonableness, and the commission held that the carrier could not be heard to say that reparation should be denied because the shipper had passed on the charge to his purchaser.

In *Spiegel vs. Southern Railway*, 31 I. C. C. 687, decided January 19, 1915, the commission reiterates its rule with regard to proof of damage where discrimination is the gravamen of the claim, and, impliedly overruling any former decisions it may have made, says on page 689:

“Since our former opinions were promulgated the United States Supreme Court in *International Coal Co. vs. P. R. Co.*, 230 U. S. 200, has held that before an award of reparation can be made on account of undue discrimination or preference on the part of carriers subject to the act, the complainant must prove that he was actually damaged by reason of such undue discrimination or preference, and furthermore must prove the amount of such damage.

Mere proof of particular shipments made and of the freight paid does not make out a prima facie case. Complainant must establish the fact and the amount of his damage. *New Orleans Board of Trade vs. I. C. R. Co.*, 29 I. C. C. 32.”

The Federal courts have also preserved this distinction and gone even further. In *Lehigh Valley R. Co. vs. Clark*, 207 Fed. 717, an action brought on a reparation order of the Interstate Commerce Commission. Circuit Judge Gray of the Third Circuit says on page 724, repudiating the rule by the commission that it will presume damage in cases of unreasonableness, to the extent of the difference between the reasonable and the unreasonable rate:

“It does not necessarily follow, from a finding by the commission that a given tariff rate

established by the defendant is unreasonable and that a lower rate fixed by the commission is reasonable, that plaintiff has suffered pecuniary damage by reason of the exaction by defendant of the former rate, or, if any such damage has been suffered, that the difference between the rate abrogated and the lower rate established is the measure of such damage. If any damage is shown, it may be even greater or less than such difference.

The authorization of a suit for damages by one claiming to be injured by a specific violation of the Act by a carrier, is not the imposition of a penalty in addition to the fines imposed and made payable to the government for every specific violation of a requirement of the Act, but a remedy for the recovery of damages actually incurred by a private person because of the wrongful act of the carrier."

In *Darnell-Taenzer Lumber Co. vs. Southern Pacific Co., et al.*, 221 Fed. 890, decided April 6, 1915, the Circuit Court of Appeals of the Sixth Circuit, speaking through Circuit Judge Knappen, and citing among other decisions of the Interstate Commerce Commission the Kindelon case in 17 I. C. C. 251, referred to by counsel for defendant in error, says:

"Since the foregoing decisions of the commission the Supreme Court has held, in a case involving discrimination in rates as between competing shippers, that the damages recoverable by the shipper against whom the discrimination is practiced must be proved; that the damages are not necessarily measured by the difference

between the published rate paid by the complaining shipper and the lower rate given to a more favored shipper, but may be more or less than such difference. *Penna. R. Co. vs. International Coal Co.*, 230 U. S. 184, 203, 33 Sup. Ct. 893, 57 L. Ed. 1446. While the commission applies this rule in discrimination cases (*New Orleans Bd. of Trade vs. Illinois Central R. Co.*, 29 I. C. C. 32; *Spiegel vs. Southern Railway Co.*, 32 I. C. C. 687), it has never in cases of purely unreasonable and excessive rates departed from the rule announced in the Burgess case. A few of the many cases, subsequent to the International Coal Co. case, in which the rule in the Burgess case has been applied by the commission are cited in the margin. While the Supreme Court in the Meeker cases reaffirmed the rule that damages in reparation cases must be proved, that Court, so far as we have seen, has not passed directly upon the proposition involved in the Burgess case and in the instant case; the nearest approach thereto being the holding in the Meeker cases that the commission did not apply 'an erroneous or inadmissible measure of damages' in finding that the shippers were damaged to the extent of the difference between what they actually paid and what they would have paid under a reasonable rate. In the Meeker cases no evidence of damages was presented except the commission's findings, and the evidence on which the commission acted did not appear.

We find nothing in either the International Coal Co. case or the Meeker cases conflicting with the view that damages resulting from the

imposition of unreasonably excessive rates are *normally* measured by the difference between the rate charged and a reasonable rate. Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is *ipso facto* unlawful."

Thus we see that the defendant in error in the case at bar cannot rely upon the theory of unreasonableness, because he has not pleaded that the rates collected were unreasonable in and of themselves. His claiming the rate collected to be excessive involves him in another difficulty, in that, if it is excessive the commission, as we have shown in the opening brief, is given the primary jurisdiction by Section 71-a of the California Public Utilities Act to pass the claim of excessiveness. He thus is driven from point to point until he arrives at the conclusion that his clients have been discriminated against and that therefore he may bring an action under the provisions of the California statutes, which he cites at length. But this position is likewise untenable, because he has not applied to the California Commission and because the very section upon which he now seeks to found his action gives a right of action only for the damages actually sustained, and he has neither pleaded nor proven that he has been damaged. The apparent bewilder-

ment of defendant in error may be accounted for by the fact, as pointed out in our briefs herein, that he is seeking to recover the difference between a charge which was established by the commission, which is not claimed to be unreasonable in and of itself, and a charge which was established by the commission for the transportation of the same class of commodity to another point and under entirely different circumstances and conditions. We do not feel that the tortured construction of the California Constitution and statutes attempted to be argued by counsel should be indulged in to the wrecking of the system of commission-made rates which carrier and shipper alike were bound to observe.

IV.

On page 42 of counsel's brief he cites and quotes copiously from *Great Western Railway Co. vs. Sutton*, 4 English & Irish Appeals 236; 38 L. J. Ex. 177, L. R. 4 H. L. 226. Just why stress is laid on this case we are unable to say. The case is direct authority to the point that no right of action existed at common law where one shipper was charged more than another, if the charge exacted from the complaining shipper was just and reasonable in and of itself. It is not claimed here that the intermediate rates paid by the assignors of defendant in error were unjust or unreasonable. Apparently counsel cites the case because he realizes that as the California Constitution gave no right of action, and as there was no right of action at common law, he must found his right of action upon some statutory provision.

It is true that in the Sutton case it was held that an action for money had and received was maintainable in English courts for the recovery of overcharges made in violation of the obligation imposed upon the railroad company by the Act of Parliament (8-9 Vict. 251) known as the Railway Consolidation Act of 1845, and particularly Section 90 thereof, which counsel does not quote in full on page 44 of his brief, but which was held in *Denaby Main Colliery vs. Manchester, Sheffield & Lincolnshire Railway Co.* (1885), 11 Law Reports, Appeal cases, to require equality of rates "passing only over the same portion of the line of railway under the same circumstances", and only as to goods passing between the same points of departure and arrival, and passing over no other part of the line.

The reasoning of the English court is founded entirely upon the supposition that the mere prohibition of the statute created an obligation to charge equally under the same circumstances, which obligation could be enforced by the action for money had and received. That this is not the law in the United States we think is shown by the cases cited in our brief to the effect that a mere statutory prohibition creating a duty or obligation unknown to the common law does not give rise to a right of action unless the same or another statute so prescribes; and further that where the legislature has prescribed a penalty for failure to fulfill this new duty, which in the case at bar is by suit by the State, no private action will lie for a violation of a prohibition as to which suit by the State is the only

prescribed means of enforcement. In *Fitchburg Railroad Co. vs. Gage*, 78 Mass. 393 (12 Gray 393), the Court says on page 398:

“The recent English cases cited by the counsel for the defendants are chiefly commentaries upon the special legislation of parliament regulating the transportation of freight on railroads constructed under the authority of the government there; and consequently throw very little light upon questions concerning the general rights and duties of common carriers, and are for that reason not to be regarded as authoritative expositions of the common law upon those subjects. The principle derived from that source is very plain and simple. It requires equal justice to all. But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to do this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time or in certain quantities for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief.”

In citing the Sutton case and the cases therein referred to, counsel entirely disregards the fact that when the State of California established a

public agency for the regulation of rates, which could not be deviated from except under extreme penalties, and continued that regulation in force by the appointment of a commission and by acquiescence in the action of such commission, the reason for the rule laid down in the Sutton case entirely ceased. This is true because at the time of the decision in the Sutton case England had no railway commission such as it has now. Railway rates were established by Act of Parliament, such as the act cited in counsel's brief and considered in the Sutton case. The Act of Parliament was supreme; no question of confiscation, unreasonableness or interference with foreign or domestic commerce could be raised in opposition to it. There was nothing in the English law to prevent the hard and fast application of the long and short haul rule, nor was there anything to prevent the requirement by Parliament that the carriers should charge certain rates and none other. It is a historical fact, abundantly evidenced by the English statutes and decisions, that the railroads of England, and particularly the one which was being considered in the Sutton case, were organized by special charters emanating from the sovereign, and that of those special charters the Railways Consolidation Act, as abundantly appears from its preamble, was made an integral part.

Therefore the Massachusetts court, in the case just cited, referred to the fact that the roads considered in the English decisions were railroads constructed under the authority of the government. The railroads so constructed had to take their

charters as they were given them, or not do business, and when they constructed and operated under their charters they were charged with the duty of observing the rates and methods of rate-fixing prescribed by the charters and by the Consolidation Act which by express provision was made a part of the charters. Therefore the English situation is not at all equivalent to the California situation, where the people have delegated the manner of rate-fixing to a commission, subject only to constitutional limitations, which properly considered, we contend made the long and short haul sentences merely admonitions to the commission, and not mandatory and prohibitory clauses as claimant contends here.

V.

The case of *L. & N. Ry. Co. vs. Walker*, 63 S. W. 20, 110 Ky. 961, cited by counsel on page 53 of his reply brief, may be differentiated from the case at bar because the Kentucky statute (Sec. 819, quoted in *McChord vs. L. & N. Ry. Co.*, 183 U. S., at p. 490), for unjust or unreasonable preference or discrimination gave to the party aggrieved a right of action for the damages sustained. Moreover, as herein pointed out, the Kentucky carrier was allowed to fix the rate for the longer haul (110 Ky., on p. 965) which is not and has never been the case in California. The case is not authority here for these reasons.

The same observation may be made as to *Hutchinson vs. Railroad Co.* (Ky.), 57 S. W. 25, also cited on p. 53 of counsel's brief.

As to the cases of *Junod vs. Railway Co.*, 47 Fed. 290, and *Osborne vs. Railway Co.*, 48 Fed. 49, referred to on page 53 of counsel's brief, and quoted from at length on subsequent pages, it appears that Judge Shiras, who charged the jury in both cases, based his charge on the provisions of the Act to Regulate Commerce, as he said (p. 294, 47 Fed.):

“By the provisions of the Interstate Commerce law it is provided that parties who may have been unjustly discriminated against and who may be damaged thereby are entitled to sue and to recover the money damages caused to them by the violation of the Act, and it is under this provision of the statute that this action is brought.”

The Osborne case got into the United States Supreme Court under the title of *Parsons vs. C. & N. W. Ry.*, 167 U. S. 447, 42 L. Ed. 231, and there the Supreme Court in affirming the judgment of the Circuit Court of Appeals in 52 Fed. 912, which reversed Judge Shiras' ruling, used this language:

“We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates charged for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to re-

cover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.

Again, his cause of action is based entirely on a statute, and to enforce what is in its nature a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have entitled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduce still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that through any misconduct or partiality on the part of the railway officials shippers in Nebraska had been given a lesser rate.

It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty

is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed.

* * * * *

The only right of recovery given by the Interstate Commerce Act to the individual is to the 'person or persons injured thereby for the full amount of damages sustained in consequence of any of the violations of the provisions of this act.' So, before any party can recover under the act he must show not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

This language is significant in the case at bar because:

Section 71-a of the California Public Utilities Act, in effect upon this action was brought requires an application to the commission for a reparation order respecting "excessive or discriminatory" charges before the carrier can be sued; and

Neither injury nor damage to plaintiff or its assignors is pleaded or proven here.

VI.

On oral argument we cited the case of *Wabash etc. R'y Co. vs. Illinois*, 118 U. S. 557, and particularly called attention to the concluding portion

of the Court's opinion, in which the effect of the Illinois statute as an interference with interstate commerce was clearly described.

It may be well to supplement that citation with the opinion delivered by Mr. Justice Peckham in *Louisville & Nashville R. Co. vs. Eubank*, 184 U. S. 27. In that case the Kentucky courts had held that Section 218 of the Kentucky Constitution, which was a long and short haul section, and which did not in terms limit its operation to the State, or exclude its operation upon interstate commerce, applied the rate charged by the railroad company from Nashville, Tennessee, to Louisville, Kentucky to intermediate Kentucky points. The Court held that the effect of the decision of the State Court was to embrace cases where the long haul was from a place outside of Kentucky to one within the State, and the short haul was between points on the same line within Kentucky; and that the Kentucky court's theory was that the constitutional provision operated solely upon the rate within Kentucky, making that rate unlawful if it exceeded the rate for the longer distance over the same line in the same direction, although the longer distance was from a point in another State to a point in Kentucky. Mr. Justice Peckham further observes that

“The contention is that the State does not prescribe or regulate rates outside of its borders; that the company may announce and enforce any rate it pleases regarding interstate commerce.”

After discussing the facts, the Court says:

“We fully recognize the rule that the effect of a State constitutional provision or of any State legislation upon interstate commerce must be direct and not merely incidental and unimportant; but it seems to us that where the necessary result of enforcing the provision may be to limit or prohibit the transportation of articles from without the State to a point within it, or from a point within to a point without the State, interstate commerce is thereby affected, and may be thereby to a certain extent directly regulated, and in that event the effect of the provision is direct and important and not a mere incident.”

The Court then comments on the *Wabash* case, 118 U. S. 557, and also takes up the argument that the State may use an interstate rate as a measure for fixing legal rates on the same line at intermediate points, but disposes of that argument by saying:

“In the case at bar the State claims only to regulate its local rates by the standard of the interstate rate, and says the former shall be no higher than the latter, but the direct effect of that provision is, as we have seen, to regulate the interstate rate, for to do any interstate business at the local rate is impossible, and if so, it must give up its interstate business or else reduce the local rate in proportion. That very result is a hindrance to, an interference with, and a regulation of, commerce between the States, carried on, though it may be, by only a single company.”

Mr. Justice Brewer dissented in an able opinion which endeavored to uphold the right of the State

to use an interstate rate as a measure, although the effect of so doing might be to deprive the terminus outside of the rate-fixing State of competitive advantages. His reasoning, so far as we can ascertain, has not been upheld in any subsequent opinion of the United States Supreme Court.

The development of modern legislation respecting regulation of interstate and intrastate rates has been such since the Eubanks case that perhaps the question will never again be seriously considered. It is clear that for a State to use either a voluntary, water-compelled terminal rate, or a commission-fixed terminal rate, at a point outside the State, as a measure for intrastate rates, is inevitably to burden and hinder the flow of commerce in and out of the State adopting such an archaic rule.

VII.

During the oral argument the following colloquy took place:

Judge Rudkin: "Suppose the legislature of California had prescribed \$1 per hundred from here to Los Angeles and you charged \$2 per hundred, could not the party recover it back?"

Mr. Booth: Assuming that the rate was proper and accompanied by due process.

Judge Rudkin: That is practically what the Constitution does in this case and what the other side claims.

Mr. Booth: Yes, sir. If, in fact, the rates contended for here were in excess of the lawful rate we do not claim that an action for overcharge cannot be maintained," etc.

It occurs to us in reading the transcript that possibly Judge Rudkin had in mind that assuming the through rate to be the lawful intermediate rate as contended by defendant in error, the shipper might sue without first resorting to the commission. Counsel for plaintiff in error did not and does not so concede. The California Constitution and California Public Utilities Act, to our mind require an application to the commission in all cases of excessive unreasonable or discriminatory collections. No exception is made and as the commission, unlike the Interstate Commerce Commission is a judicial body, we claim that the Federal decisions relied on by counsel are inapplicable on the question of reparation. This case must be determined in that respect solely in view of the California statutory and constitutional provisions as construed by the Supreme Court in *Telephone Company vs. Eshleman*, 166 Cal. 640, heretofore cited.

It is not true as intimated by counsel on pp. 159-160 of his brief that the California courts have authoritatively held that if a shipper has a right of action for violation of the long and short haul clause he need not first apply to the commission. The District Court of Appeal so held as mere dictum in *Southern Pacific Company vs. Superior Court*, 150 Pacific Reporter 397, referred to on page 150 of our opening brief. The Supreme Court, however, in

response to our petition for transfer and rehearing expressly declined to approve the District Court's views in that respect (150 Pacific Reporter, p. 404; cited in our brief, p. 151).

VIII.

Throughout this litigation counsel has briefed his case on the theory that if we did not analyse, criticise and distinguish each case cited and point made by him, we should thereby be held to concede it. Nevertheless, in this supplement to our oral argument we have merely discussed some of the more salient features of our case, not intending to recede from any position taken in our opening brief and not conceding, by silence, any of the arguments urged by counsel in support of his complaint.

We respectfully submit that defendant in error can succeed in this case only by a judicial interpretation of California constitutional and statutory provisions far different from that placed upon them by their framers, by the people in adopting them, by the carriers and by a uniform acquiescence and contemporaneous construction extending over thirty years.

It is therefore submitted that the judgment of the District Court should be entirely reversed.

Respectfully submitted,

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No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a
corporation,

Plaintiff in Error,

vs.

CALIFORNIA ADJUSTMENT COM-
PANY, a corporation,

Defendant in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR

In Error to the United States District Court for the Northern
District of California, Second Division.

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In its supplemental brief plaintiff in error has not maintained the order established in its opening brief. Nevertheless, in writing this reply, we have endeavored to segregate the various arguments contained in plaintiff in error's supplemental brief so as to answer them in the same subdivisions into which our brief now on file is divided; therefore, this brief will be subdivided in the same manner as the brief first filed.

The contentions made in the supplemental brief of plaintiff in error based upon the claim that the rates to the more distant points were established by the Commission, and the contentions based upon the assumption that established rates cannot be deviated from by charging less will be replied to under the sixth head commencing at page 56.

1. That the long and short haul provision of the Constitution of 1879 does not in terms attempt to regulate interstate commerce, and even if it were susceptible of such construction, it could not be said that the people would not have prohibited the charging of more for the short than for the longer haul within California had they known that they could not enforce such a prohibition in the case of interstate commerce.

No attempt is made in the supplemental brief of plaintiff in error to answer the argument made under this head of the brief of defendant in error. At the conclusion of its supplemental brief plaintiff in error states that it "does not concede, by silence, any of the arguments urged by counsel." Counsel say the purpose of the supplemental brief "was merely to discuss some of the more salient features of our case." We were under the impression that counsel for plaintiff in error supposed the contention replied to under this head was one of the more salient features of the case.

The case of *Wabash Etc. Co. v. Illinois*, 118 U. S. 557, cited by plaintiff in error in support of its contention was a case involving interstate shipments. In that case the Supreme Court of Illinois has held that a provision of any Illinois Statute similar in its general effect to our constitutional provision governed the rates on shipments to points in other states. It was alleged in the complaint that the Wabash Company charged Elder & McKinney for transportation from Peoria, Illinois, to New York City, the sum of \$39.00, being at the rate of 15 cents per hundred pounds for the shipment, and that on the same day they agreed to transport for Isaac Bailey and F. O. Swanell, a shipment from Gilman, Illinois, to New York City, for which they charged the sum of \$65.00,

or a rate of 25 cents per hundred pounds. It was further alleged that the Elder & McKinney shipment was transported 86 miles further in Illinois than the last mentioned shipment. Gilman is a town in Illinois 86 miles nearer the eastern boundary of the State than Peoria is.

The provision of the Kentucky Constitution under consideration by the United States Supreme Court in *Louisville and N. Ry. Co. v. Kentucky*, 183 U. S. 503, was as follows:

“It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the Railroad Commission, such common carrier, or person or corporation owning or operating a railroad in this State, may, in special cases after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers, or property; and the Commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operations of this Section.”

The foregoing provision was contained in Section 218 of the Constitution.

It will be noted that it was subject to be distorted in the same way that the California Constitution is sought to be distorted here. It could have been argued with the same force there as here that the Constitution was violated because a carrier charged a lesser amount to a point without the State. In the case of *Louisville and N. Ry. Co. v. Kentucky*, *supra*, the railroad company had been indicted and fined for charging a greater amount for transportation for a shorter than for a longer distance, the short haul and long haul points both being within the State. Undoubtedly the constitutional provision was subject to the distorted construction that rates to a point within the State of Kentucky should not be higher than those charged to a point on the same line beyond the state boundary. In fact, a county court of Kentucky in an action commenced by one Eubank against the Louisville and Nashville Railway Company, had so held. This decision was reversed by the United States Supreme Court in *Louisville and Nashville Ry. Co. v. Eubank*, 184, U. S. 27.

In reversing the judgment of the County Court, the Supreme Court said:

“We are of opinion that *as construed by the State Court*, and in so far as it is made applicable to or affects interstate commerce, Section 218 of the Constitution of Kentucky is invalid, and the judgment of the Circuit Court of Simpson County, Kentucky, is therefore reversed.”

The case of *Louisville and Nashville Ry. Co. v. Eubank*, *supra*, is referred to at length at page 97 of the supplemental brief of plaintiff in error.

But it apparently never occurred to the railroad company in *Louisville and N. Ry. Co. v. Kentucky*, 183, U. S. 503, *supra*, to contend, *because rates within the State could not be based on interstate rates, that the people of Kentucky would not have enacted the provision insofar as it related to cases where the short and long haul points were both within the State of Kentucky*. The railroad company did contend, however, that the constitutional provision “operated as an interference with interstate commerce and is therefore void.” In ruling on this contention the Supreme Court said that it *was apparent the long and short haul distances mentioned were distances upon the railroad within the State*. The Court said:

“The final contention, that Section 218 of the Constitution of Kentucky operates as an interference with interstate commerce, and is therefore void, need not detain us long. It is plain that the provision in question does not in terms embrace the case of interstate traffic. It is restricted in its regulation to those who own or operate a railroad within the State, *and the long and short haul distances mentioned are evidently distances upon the railroad within the State*. The particular case before us is one involving the transportation of coal from one point in the State of Kentucky to another by a corporation of that State.”

The judgment of the Court of Appeals of Kentucky was affirmed by the Supreme Court.

2. The long and short haul clause of the Constitution of 1879 and the long and short haul clause of the Constitution as amended October 10, 1911, do not violate the Federal Constitution.

No further argument in support of plaintiff in error's contention is made in its supplemental brief.

3. A person who is required to pay more than the legal charge for transportation of freight has a common law right to recover the overcharge, and in addition to such common law right has the statutory right conferred by the Statutes of 1909, 1911, and the Public Utilities Act.

In referring to the argument made under this head of our brief, counsel for plaintiff in error state:

“Beginning at the bottom of page 65 of the brief of defendant in error, its counsel, evidently realizing that it would be futile to contend that there was any right of action at common law, seeks to found his action herein upon the non-discriminatory sections of the California Constitution and statutes.”

We certainly have not “realized” that the liability of the plaintiff in error to refund the overcharges in this case is not enforceable on common law principles. This matter is fully discussed at pages 40 to 57 of our brief. As said by Mr. Justice Blackburn in *Great Western Ry. Co. v. Sutton*, 4 Eng. & Ir. App. 236:

“I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line, must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable.”

The decision of Mr. Justice Blackburn was affirmed by the House of Lords (L. R. 4 H. L. 226). In deliv-

ering the opinion, Lord Chelmsford said:

“The last subject to be considered is the form of the action; whether an action for money had and received will lie to recover back overcharges made upon the carriage of the plaintiff’s goods, not absolutely but relatively to the charges made to other persons. It was argued for the defendants that the charge upon the plaintiff’s packed parcels, being warranted by the 10 and 11 Vict., ch. 226, and being reasonable, and within the absolute discretion of the company, the plaintiff was not injured by other persons being charged less than he was. But this is a fallacious way of viewing the question. The plaintiff’s complaint is not that others are charged less than himself, but that the fact of their having been charged less entitled him to claim the same rate of charge, and that all beyond that rate is overcharge.”

As pointed out at pages 40 et seq. of our brief, the argument of plaintiff in error is based upon the erroneous assumption that because (as held in *Cowden v. P. C. S. S. Co.*, 94 Cal. 470) discrimination was not contrary to the common law, a common law remedy is not open to a person who is overcharged by discrimination after discrimination has been made unlawful by statute.

Referring to *Great Western Ry. Co. v. Sutton*, 4 Eng. & Ir. App. 236; L. R. 4 H. L. 226, *supra*, counsel for plaintiff in error state:

“The reasoning of the English court is founded entirely upon the supposition that the mere prohibition of the statute created an obligation to charge equally under the same circumstances, which obligation could be enforced by

the action for money had and received. That this is not the law in the United States we think is shown by the cases cited in our brief to the effect that a mere statutory prohibition creating a duty or obligation unknown to the common law does not give rise to a right of action unless the same or another statute so prescribes; and further that where the legislature has prescribed a penalty for failure to fulfill this new duty, which in the case at bar is by suit by the State, no private action will lie for a violation of a prohibition as to which suit by the State is the only prescribed means of enforcement."

The provision of the Constitution as it existed prior to the amendment of October 10, 1911, was not a prohibition but an affirmative provision that property should be transported to the less distant point at charges not exceeding those made to the more distant point.

By the provisions of Section 21, both before and after the amendment of October 10, 1911, *charges in excess of a certain standard were made unlawful*. The standard established was not a standard which existed at common law. The cases cited by plaintiff in error absolutely fail to sustain its contention that where a statute prohibits charges in excess of a certain standard no action lies to recover charges exacted in excess of such a standard, unless the statute so provides. The cases cited by plaintiff in error, commencing with *Ward v. Severance*, 7 Cal. 126, are fully discussed at pages 49 et seq. of our brief. Not only do these cases fail to sustain such contention but by implication they all hold contrary thereto. In *Savings Association v. O'Brien*, 51 Hun. 45, the second case cited, where the Court had under consideration a

statute imposing a liability on stockholders of a corporation, the Court said:

“A general liability created by statute without a remedy may be enforced by a common law action, but where the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed.”

It might be argued here with equal force that a statute requiring carriers to file their tariffs and prohibiting charges in excess of the tariff rate would not of its own force confer upon a person required to pay in excess of the tariff rate the common law right of action to recover the overcharge. There is nothing in the common law prohibiting a carrier from charging in excess of its tariff rates, but when a statute prohibits charges in excess thereof, it necessarily follows, in a case where the statute is violated, that a common law action to recover the overcharge is maintainable, just as under the common law an action is maintainable to recover the excess over a reasonable charge. Counsel have confused the right and the remedy to enforce the violation of the right. It does not follow because a right is a statutory one that a ^{claim based on a} violation thereof is not enforceable by a common law remedy.

The foregoing quotation from the supplemental brief of plaintiff in error concludes with a reference to the penalty provided by Section 22 of Article XII of the Constitution before its amendment on October 10, 1911. It is said “that where the Legislature has prescribed a penalty for failure to fulfill this new duty, which in the case at bar is by suit by the State, no private action will lie for a violation of the prohibition as to which suit by the State is the only pre-

scribed means of enforcement.” The provision of the Constitution referred to is as follows:

“Any railroad corporation or transportation company which shall fail or refuse to conform to such rates as shall be established by such Commissioners, or shall charge rates in excess thereof, or shall fail to keep their accounts in accordance with the system prescribed by the Commission, shall be fined not exceeding twenty thousand dollars for each offense.”

Counsel contend that this penalty is “exclusive” and that a person charged in excess of the rates established by the Commission has no cause of action to recover the overcharge. This contention is palpably unsound. After providing for such penalty Section 22 of Article XII provides:

“In any action against such corporation or company for damages sustained by charging excessive rates, the plaintiff, in addition to the actual damages, may, in the discretion of the judge or jury, recover exemplary damages.
* * * Nothing in this section shall prevent individuals from maintaining actions against any of such companies.”

Clearly by the term “excessive rates” was meant rates in excess of the standard prescribed by the Constitution. The term comprised not only charges in excess of the provision of Section 21 requiring carriers to transport property to less distant points at charges not exceeding the charges to more distant points, but also comprised charges in excess of the rates established by the Commission.

Counsel for plaintiff in error state (p. 92):

“In citing the *Sutton* case counsel entirely dis-

regards the fact that when the State of California established a public agency for the regulation of rates, which could not be deviated from except under extreme penalties, and continued that regulation in force by the appointment of a commission and by acquiescence in the action of such commission, the reason for the rule laid down in the *Sutton* case entirely ceased."

The Sutton case was cited to the point that where a statute fixed a certain standard of rates and rates in excess of the standard so fixed were charged by a carrier, the person required to pay such rates has a common law right of action to recover the excess over the standard fixed by the statute.

We presume the above quoted excerpt is merely another way of stating the oft-repeated contention that the Commission could establish rates which violated the provisions of Section 21 of the Constitution.

We supposed the contention that plaintiff's assignors had no common law right of action assumed (for the sake of the argument at least) that a higher rate could not be lawfully charged for the shorter distance for unless such assumption is indulged in plaintiff in error might as well have not made the contention. It is, we submit, illogical and confusing to attempt to support this contention by advancing arguments in its support which assume a condition which, if it existed, would render it unnecessary to make the contention at all.

At page 91 of the supplemental brief of plaintiff in error there is a quotation from the opinion of the Supreme Court of Massachusetts in the case of *Fitchburg Railroad Co. v. Gage*, 78 Mass. 393, 12 Gray 393.

In that case, which was an action to recover freight charges, the defendant by set-off sought to recover an alleged overpayment. The defendant alleged that the plaintiff charged other shippers a lower rate for the transportation of brick than it charged defendant for the transportation of ice and sought to set-off the excess against the claim of the plaintiff. The report does not disclose the titles of the "recent English cases" cited by the defendant and referred to in the opinion of the Court. The opinion, however, states that they are "chiefly commentories on the special legislation of Parliament regulating the transportation of freight on railroads constructed under the authority of the government there," and that they "are not to be regarded as authoritative expositions of the common law on these subjects." Whether the *Sutton* case was one of the cases cited we do not know. It is very certain, however, that the *Sutton* case in addition to construing the statute under consideration also contained an exposition of the common law. We are not here concerned with the construction of the English statute and the case is cited by defendant in error solely because of its exposition of the common law.

At page 93 of their supplemental brief counsel for plaintiff in error state that the case of *L. & N. Ry. Co. v. Walker*, 63 S. W. 20, 110 Ky. 961, may be differentiated from the case at bar because the Kentucky statute gave to the party aggrieved a right of action for damages for unjust or unreasonable preferences or discrimination. So do the statutes of 1909, 1911 and the present Public Utilities Act. This case is direct authority to the effect that this action is maintainable under the provisions of these statutes as pointed out at pages 37 et seq. of our brief, and that

the measure of damages is the difference between the rate charged and the rate that should have been charged.

Counsel state at page 82 of their supplemental brief that it has been uniformly held by the Interstate Commerce Commission and by the courts that proof of discrimination is not sufficient to entitle the complainant to recover.

As pointed out at pages 66 et seq. of our brief, whether the measure of damages appears upon proof of discrimination *depends upon the nature of the discrimination proved. The charging of more for the shorter than for the longer distance is discrimination of a specific kind. The prohibition against so charging renders the charge unlawful, and in the nature of things, the difference between the amount charged in violation of the prohibition and that which would have been charged had there been no violation is the measure of damages.* In *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, the measure of damages did not appear from the proof of the discrimination. The plaintiff in that case, who paid the lawful tariff rate, proved that another shipper was accorded an unlawfully low rate. In view of the requirement of the Interstate Commerce Act that a charge less than the tariff rate was illegal, it necessarily followed that if the measure of damages was the difference between such rates that plaintiff, in effect, was suing to recover the same illegal rebate.

So in *New Orleans Board of Trade v. I. C. R. R. Co.*, 29 I. C. C. 32, and in *Spiegel v. Southern Ry.*, 31 I. C. C. 687, cited by plaintiff in error, the dis-

crimination involved was not of such a nature that the amount of the damages sustained appeared upon proof of the discrimination. In *New Orleans Board of Trade v. I. C. R. R. Co.*, *supra*, the complainants who shipped tobacco from Kentucky points to New Orleans for shipment to Bristol were charged more than their competitors who shipped to Liverpool. It appeared that the steamship companies absorbed this difference and that in reality it did not cost the complainants any more to transport this tobacco to England than it did their competitors.

The case of *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, cited by counsel, was impliedly overruled by the Supreme Court in *Meeker v. Lehigh Valley R. Co.*, 35 Sup. Ct. Rep. 328, decided on the 23rd day of last February. It is also contrary to the decision of this Court rendered on the 1st of last February in the case of *Southern Pacific Company v. Goldfield Consolidated Milling and Transportation Co.*, 220 Fed. 14. It is very apparent that the decision in the case of *Lehigh Valley R. Co. v. Clark*, 207 Fed. 717, *supra*, was the result of a misapplication of the language employed by the Supreme Court in the case of *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184. In the case of *Meeker v. Lehigh Valley R. Co.*, 35 Sup. Ct. Rep. 328, 335, *supra*, the Supreme Court said:

“But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, ‘upon consideration of the evidence adduced upon the hearing upon the question of reparation’ found (2) that by reason of the unjust dis-

crimination resulting from giving the rebate to the Lehigh Valley Coal Company Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from November 1, 1900, to August 1, 1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company; and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages."

It will be noted that in the *Meeker case* the Supreme Court held that even in a case of discrimination by giving rebates where the plaintiff was charged the lawful rate it was permissible to measure his damages by the difference between the lawful rate which he paid and the unlawful rate accorded the favored shipper.

That the measure of damages in discrimination of the kind here involved is the difference between higher rate to the intermediate point and the lower rate to the more distant point clearly appears by implication from the case of *Darnell-Taenzer Lumber Co. v. Southern Pacific Company*, 221 Fed. 890 (C. C. A.) which is cited at page 86 of the supplemental brief of plaintiff in error. This case was decided on April 6, 1915, after the decision of the Supreme Court of that *Meeker case*. The *Darnell-Taenzer case* was an action upon an award of reparation by the Interstate Commerce Commission. After referring to the decision in the *Meeker case* to the effect that the dif-

ference between the rate charged and a reasonable rate is the normal measure of damage the Circuit Court of Appeals for the Sixth Circuit said:

“Cases of excessive and unreasonable rates differ from discriminating charges in the fact that in the latter *there is nothing unlawful in the charging and receiving of the higher or published rate on which the demand for reparation is based; the unlawfulness is in giving a lower rate to someone else. On the other hand, the charging of an excessive and unreasonable rate is ipso facto unlawful.*”

So in the case at bar the charging of a higher rate to the less distant point was *ipso facto* unlawful. The charging of such a rate is discrimination, but it is not discrimination of the nature involved in the charging of a less than lawful rate to a favored shipper. As held by the Circuit Court of Appeals for the Sixth Circuit, the reason why in the last mentioned case the difference between the two charges is not *prima facie* the measure of damages is that it was not unlawful to charge the plaintiff the published tariff rate. But in the case at bar the charges were unlawful because in direct violation of the Constitution.

Nix v. Southern Railway, 31 I. C. C. 145, the syllabus of which is quoted by plaintiff in error at page 84, was primarily a proceeding before the Commission to have the rates on apples from Virginia to eastern cities reduced on the ground that they were unreasonable and discriminatory. Incidentally reparation was claimed on some shipments because of an alleged violation of the Fourth Section of the Interstate Commerce Act. From reading the decision it is difficult to determine whether the complainants actually paid

charges maintained in violation of the Fourth Section or whether they were complaining merely because other shippers at more distant points were accorded lower rates (p. 149). The only case cited by the Commission was *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, and as we have repeatedly pointed out that case is not authority here.

In the *International* case the rate charged was the lawful rate whereas a rate charged in violation of the long and short haul provision is an unlawful rate. In the *International* case the plaintiff was in effect suing to obtain a rebate, whereas in this case he is suing to recover the difference between the lawful and the unlawful rate. In the *International* case in the brief of counsel for the carrier, it was said: "This payment represented a charge which the one party was legally obliged to ask and the other one legally obliged to pay." In this case the charge is one made in direct violation of the law. In the *International* case the Supreme Court said that to adopt the rule contended for by the plaintiff in that case and to "arbitrarily measure damages by rebates, would create a legalized but endless chain of departures from tariffs; would extend the effect of the original crime." In this case the measuring of the damages by the difference between the two rates would create no departure from any tariff which conformed to the law. It would not "destroy the equality or certainty of rates" but on the contrary would make the rates conform to the express requirement of the Constitution. In the *International* case the Court said that plaintiff's contention "would make the carrier liable to damages beyond those inflicted and to persons not injured," but in this case the measure of damages in-

sisted upon here would not make the carrier liable for damages beyond those inflicted nor to persons not injured, for if the carrier had not violated the law, the shipper would not have been charged more for the shorter distance. In the *International* case the Court said that if the measure of damages contended for were correct the payment of damages for a violation of the law against rebates might be used as a means of paying rebates under the name of damages. But in this case the refund of the difference between the rate collected and that which should have been collected does not constitute a rebate as a rebate is a drawback from the lawful rate.

The long and short haul provision of Section 21 before its amendment was adopted from the Constitution of Pennsylvania of 1873 (Sec. 3, Article XVII) and that provision of the Pennsylvania Constitution was taken from an Act of the Legislature of Pennsylvania (March 7, 1861, P. L. 88) which provided that the local rates from Pittsburg and Philadelphia to intermediate points should at no time exceed the rate from Pittsburg to Philadelphia or from Philadelphia to Pittsburg. (*Central Iron Works v. P. R. R.*, 17 Pa. Ct. 652.)

In *Central Iron Works v. P. R. R.*, 17 Pa. Ct. 652, *supra*, decided under the provisions of the Constitution of Pennsylvania, from which the provisions of our Constitution were derived, the Court held that a person who was charged more for the shorter haul could maintain concurrently an action at law to recover the *overcharge* and a suit in equity to enjoin the carrier from thereafter making a greater charge for the shorter haul.

Moreover, Section 21 of the Constitution as it existed before the amendment, expressly conferred upon the shipper the right to have his property transported to the less distant point at charges not exceeding those maintained to the more distant point. It not only made it unlawful to charge a higher rate for the lesser distance, but expressly provided that the lower rate for the greater distance should be the rate for the lesser distance. On October 10, 1911, the phraseology of Section 21 was changed. The purpose of the amendment was to legalize a higher rate for the shorter distance in special cases, where after investigation the Commission should so authorize. Clearly the people intended no change other than this. If they had intended that the right of a shipper existing prior to the amendment to have his property transported at charges not exceeding the charges made to the more distant point, such a fundamental change in the law would have been clearly evidenced. The measure of damages of a person who was injured by a violation of the section before its amendment was fixed by the very language of the section itself. The amendment of October 10, 1911, clearly did not change that measure.

The case of *Osborne v. C. and N. W. Ry. Co.*, 48 Fed. 49, was cited because of the language used by Judge Shiras in charging the jury. This was an action to recover damages for an alleged violation of the long and short haul clause of the Interstate Commerce Act. The jury were instructed that if the defendant charged more for a shorter distance, under substantially similar circumstances and conditions, the measure of damages of the person required to pay such higher charges was the difference between the rate

which he paid and the lower rate to the more distant point. As stated at page 53 of our brief, the Circuit Court of Appeals reversed the judgment upon the ground that the evidence showed that no greater charge had been made for the shorter distance.

The statement at page 94 of the supplemental brief of plaintiff in error that the case got into the United States Supreme Court under the title of *Parsons v. C. and N. W. Ry. Co.*, 167 U. S. 447, is incorrect. The *Parsons* case was a somewhat analogous but different case. In the *Parsons* case judgment was rendered in favor of the defendant on demurrer to the complaint and the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals. In the *Osborne* and *Junod* cases, judgment was rendered in favor of the plaintiffs in the trial court and those judgments were reversed by the Circuit Court of Appeals upon the ground already stated. So in the *Parsons* case, the judgment of the Circuit Court of Appeals was affirmed upon the ground that the complaint did not show a violation of the long and short haul clause of the 4th section of the Interstate Commerce Act. Referring to the complaint, the Supreme Court said (page 456):

“Nowhere in these counts is there an allegation as to the through rates from Nebraska or Iowa points to the four above-named eastern cities, or to any other place beyond the eastern terminus of defendant’s road. There is nothing, therefore, to show *that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same*

four places. No figures as to the through rate are given; no averments as to its relation to the local rates on the defendant's road, whether from Nebraska or Iowa to Chicago. So that if we regard this tariff as being (what on its face it purports to be) a joint tariff, *there is no violation of the fourth section of the interstate commerce act, the one containing the long and short haul clause.*

“But it is said that there is an averment that the fixing or naming of Turner and Rochelle as the pretended termini of the shipments of corn and oats under the special tariff was a mere device to evade the law; that they were not grain markets, and had no elevators or facilities for handling grain, and that the grain was intended to be, and was in fact, transported by the defendant to Chicago, and there sold on the market or delivered to connecting roads for eastern points. It is this averment which introduces some uncertainty into the case. For if there had been no agreement between the defendant and eastern companies, and no through rates established thereby from Nebraska to the four places named, and this putting forth of the so-called joint tariff was a mere device, under color of which the defendant was shipping grain over its own lines from Nebraska to Chicago only, at less rates than were charged to the nearer points in Iowa, *there would have been a violation of the long and short haul clause.* But the trouble is the pleader does not distinctly make such a case.”

Further the Supreme Court said:

“It is true also that he alleges that when transported to Chicago the grain was sold on the market or delivered to connecting roads for eastern seaboard points. But which, he does not advise us. If the former, that might happen by the shipper's intercepting at Chicago a shipment

made under the joint tariff through to one of the four eastern points; if the latter, it would necessarily occur if the shipment was under such tariff. So the former is consistent with and the latter implies the joint tariff. *Neither makes certain any violation of the long and short haul clause."*

In the *Parsons* case the plaintiff shipped corn from a point in Iowa to Chicago. The freight was transported to Chicago by the defendant railway company. As pointed out by the Supreme Court the complaint did not allege that defendant transported corn from Nebraska points to Chicago at a lower rate than the rate paid by plaintiff. It merely alleged that the rate from Nebraska points to Turner and Rochelle (junction points west of Chicago) was less than the rate paid by plaintiff; but the Turner and Rochelle rate *was merely a part of a through joint rate to eastern seaboard points*. It was not in fact the rate to Turner and Rochelle at all. The Supreme Court said (page 457):

“That the portion of the through rate received by one of the companies party thereto may be less than the local rate, is not questioned.”

The Supreme Court assumed in the *Parsons* case that plaintiff would have been entitled to recover the difference between the rate which he paid to Chicago and any lesser rate which he could prove that Nebraska shippers paid on shipments to Chicago.

The Supreme Court expressly stated that if Parsons had shipped to New York and paid higher rate from the Iowa point than the Nebraska shippers paid for the longer distance, he would have been entitled to recover the excess.

As before stated, the plaintiff shipped all his corn to Chicago. Referring to the allegation of his complaint that the joint through tariff was not filed with the Commission and that he did not know of its existence, the Supreme Court said:

“The allegation is that this joint tariff was not filed with the commission, and not published at the Iowa stations from which plaintiff made his shipment, and that in consequence thereof he was ignorant of its rates. His argument practically is that if the tariff had been filed with the commission it might have made an order, either general or special, requiring that it be posted at the Iowa stations; that if it had been so posted he might have examined the rates and might have determined to ship his corn, not to Chicago, but to one of the four eastern points named in such tariff.”

Further the Court said:

“Every fact which he alleges might be absolutely and fully true, and yet he, with knowledge of the joint tariff, with the privilege of shipping under it, have never offered or sought to forward a single pound of corn to any other place than Chicago.”

The Court then held that if Parsons had shipped to the more distant point and paid a higher rate than the rate from Nebraska to the more distant point he would have been entitled to recover the excess. The Court said (page 460):

“If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the

extra sum he might have been charged if he had shipped."

This statement is a *dictum* but it is a *dictum* uttered in full view of the fact that the *Parsons* case was an action for damages under Section 8 of the Interstate Commerce Act, and moreover it is in accord with the decision of every court which has passed upon a similar question.

It will be noted that the long and short haul clause of the Interstate Commerce Act under consideration by the Supreme Court in the *Parsons* case made it unlawful to charge more for a shorter than for a longer distance irrespective of whether a lesser charge was made to a more distant point. In this respect it is similar to the amended Section 22 of Article XII of the Constitution of California. The long and short haul clause before the amendment of October 10, 1911, did not go to that extent. This difference may be illustrated by supposing a case where a higher rate was charged from Fresno to San Francisco than was charged from Bakerfield to San Francisco. The higher rate from Fresno to San Francisco would not have violated Section 21 before the amendment as there was no lower rate to any more distant point; but it would have violated the prohibition of Section 21 as amended October 10, 1911. In this action a lower rate was charged to a more distant point in every case.

At page 96 of its supplemental brief plaintiff in error quotes the statement of the Supreme Court in the *Parsons* case to the effect that before a party can recover under the Interstate Commerce Act he must show not merely the wrong of the carrier, but that

that wrong has in fact opened to his injury and say "This language is significant in the case at bar because neither injury or damage to plaintiff or its assignors is pleaded or proved here."

In view of the decision of the Supreme Court in the *Parsons* case that no violation of the Act was stated in the complaint and the further statement that if plaintiff had been charged more for the shorter distance he would have been entitled to recover the excess over the charge for the longer distance, the language quoted is indeed significant, but not in the way that counsel for plaintiff in error contend. *It conclusively shows that in the case of an overcharge the Supreme Court deemed the measure of damage under Section 8 of the Act to Regulate Commerce was the excess over the charge that would have been collected if the Act had not been violated.*

Where a charge in excess of the tariff is collected or where a charge in excess of the standard fixed by the long and short haul clause is collected, the person from whom it is collected can recover it either as an overcharge or as damages under the statutes. It is wholly immaterial whether we designate the excess over the lawful charge as an overcharge or as damages. A shipper who has been overcharged is necessarily damaged to the extent of the overcharge.

Union Pacific v. Goodridge, 149 U. S. 680, was an action brought to recover damages under an act of the Legislature of Colorado which provided that:

"No railroad corporation, shall without the written approval of the said Commission, charge, demand or receive from any person, company or

corporation, for the transportation of persons or property, or for any other service, a greater sum than it shall * * * charge, demand or receive from any other person * * * for a like service * * * and all concessions of rates, drawbacks and contracts for special rates shall be open to and allowed all persons * * * alike * * * except in special cases * * * when the approval of the said Commissioner shall be obtained in writing."

The plaintiff proved that it shipped a certain number of tons of freight and paid a certain rate and also proved that another shipper was charged a less rate. If plaintiff had been accorded the same rate it would have paid \$5,184.30 less than it actually paid. A jury returned a verdict in favor of the plaintiff for this sum. In the Supreme Court the defendant contended that "there was no sufficient evidence to support the verdict and especially as to the amount of damages." The Supreme Court said (page 697) :

"The damages sustained by plaintiffs were measured by the amount of such rebate which should have been allowed to them. The question whether they lost profits upon the sale of this coal by reason of the non-allowance of such rebates was too remote to be made an element of damages."

In *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, 202, the Supreme Court distinguishes the *Goodridge* case from the case then under consideration as follows:

"*Union Pacific R. R. Co. v. Goodridge*, 149 U. S. 80, 709, involved the construction of the Colorado statutes, which did not, as does the Commerce Act, compel the carrier to adhere to

published rates, but required the railroad to make the same concessions and drawbacks to all persons alike, and for failure to do so made the carriers liable for three times the actual damages sustained or overcharges paid by party aggrieved."

So here the Constitution required that the property of plaintiff's assigns should be transported at charges not exceeding the charges to any more distant point. By collecting the higher rate for the lesser distance the law was *ipso facto* violated in the same way that it was violated under the Colorado statute where the plaintiffs were charged a higher rate than was charged other shippers.

4. That it is wholly immaterial whether formal protest was made at the time of the payment of the illegal charges.

This matter is not referred to in the supplemental brief of plaintiff in error.

5. The evidence sought to be introduced by plaintiff in error fails to show that the Railroad Commission relieved plaintiff in error from the provisions of Section 21 of Article XII of the Constitution against charging less for the longer than the shorter haul.

This matter is fully discussed at pages 103 et seq. of our brief.

At the oral argument counsel referred to an opinion of the Railroad Commission filed on the preceding day in which the Commission states that on *February 15, 1912*, the Commission "issued an order authorizing the carriers to continue deviations from the long and short haul clause until the petitions had been finally passed upon by the Commission." (Page 48, supplemental brief of plaintiff in error.)

In its opinion the Commission does not state the terms of the order referred to.

Counsel for plaintiff in error had a copy of the order of February 15, 1912, before them in court at the trial, but it is evident they did not deem that the order authorized plaintiff in error to charge the rates involved in this action for they did not offer it in evidence in support of their seventh special defense. *As the opinion of the Commission does not attempt to construe any order involved in this case, we are at a loss to know just why it is referred to by counsel for plaintiff in error.*

The writer of this brief was under the impression at the time of the oral argument that the Commission in its opinion was referring to its order of January 16, 1912, sought to be introduced in evidence by the plaintiff in error.

The opinion of the Commission states that "Previous to the order of February 15, 1912, an extended investigation was made by the Rate Department of the Commission." This opinion does not state that this "extended investigation" was made prior to January 16, 1912, the date of the order sought to be introduced in evidence by plaintiff in error.

Even if the opinion of the Commission had stated that the investigation was made prior to January 16, 1912, it would be immaterial here as the fact of such investigation should have been proved at the trial by competent evidence.

Even if this opinion had stated that an investigation was made prior to January 16, 1912, it would not have been admissible in evidence at the trial as it was made in a proceeding to which the defendant in error was not a party and would have come within the rule against hearsay evidence.

In this case it was incumbent upon plaintiff in error to prove (1) that it applied to the Commission for authority to charge the lesser rates for the longer distance specified in each of the causes of action numbered from 86 to 120, both inclusive; (2) that the Commission investigated these applications; and (3) that after investigation and in special cases, the Commission authorized plaintiff in error to charge the lesser rate for the longer distance.

Plaintiff in error proved that applications were filed on December 30, 1911, but wholly failed to prove that any investigation was had or that the Commission had made an order authorizing it to charge the rate to the more distant point specified in each of

the causes of action, or that the Commission had granted any of its applications.

Although the effect of the proceedings before the Commission and of the orders made by that body, and especially of the order of January 16, 1912, are fully discussed in the brief of defendant in error, it may be of use here to refer further to the order of January 16, 1912, in view of the opinion of the Commission filed on November 8th.

The order of January 16, 1912, appears at page 424 of the Record and is copied at page 113 of the brief of defendant in error. In order to determine just what the Commission intended by its order of January 16, 1912, it is necessary to examine its notice of October 26, 1911, and its order of November 20, 1912, and also its opinion in the *Scott, Magner & Miller* case (2 C. R. C. 626) which was decided April 15, 1913, about a year and three months after the making of the order of January 16, 1912.

Although latest in date, let us first consider the opinion in the *Scott, Magner & Miller* case. In that case, the Commission expressed the view that prior to October 10, 1911, (the date of the amendment to the Constitution), it had the power under Section 22 to establish rates which contravened the provisions of Section 21. This matter has already been referred to. The rates involved in the *Scott, Magner & Miller* case had never been established by the Commission, but nevertheless the Commission went out of its way to express such view, although it did finally say that it would not consider the matter further because it was not involved (2 C. R. C. 631). This opinion was rendered after this action and many other actions

involving violations of the provisions of the Constitution, both before and after the amendment, had been filed in the State courts.

We will assume that the Commission held the same view when on October 26, 1911, it notified all carriers "To present list of deviations and to justify exceptions." (Record, Vol. 2, p. 399.) This order assumed that the carriers were legally entitled on October 10, 1911, the date of the amendment, to charge higher rates for the shorter than for the longer distance. Instead of construing the amendment to the Constitution as affording an opportunity to the carriers to obtain relief from a prohibition which theretofore had been absolute the Commission construed it as prohibiting in the future rates which theretofore had been lawful.

With this erroneous view as a basis, the Commission then adopted the further erroneous view that the prohibition of the amended Section 21 did not become operative upon the adoption of the amendment of October 10, 1911. In view of the fact that in adopting the long and short haul clause of the 4th section of the Interstate Commerce Act, the people of California had eliminated the provision of Section 4 continuing in effect existing rates pending the determination of the applications of the carriers for relief, this second error is almost as glaring as the first one.

The notice of October 26, 1911, gave the carriers until January 2, 1912, to file applications for relief. It did not state what the result would be if such application were not filed before that date.

On November 20, 1911, the Commission made an order purporting to grant to carriers

“permission until January 2, 1912, to file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission’s regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments, higher rates or fares at intermediate points.” (Record, Vol. 2, p. 404.)

It is the custom of the carriers to file from time to time supplements to their tariffs containing rate changes and this order purported to allow the filing of supplements containing higher charges to intermediate points.

The order of November 20, 1912, contained the further provision “that the Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912.”

At the hearing held on January 2, 1912, no evidence was introduced and the meeting adjourned without day.

We come now to the order of January 16, 1912 (Record, Vol. 2, p. 425), which plaintiff in error contends authorized it thereafter to charge the higher rates to the less distant points. This order commenced by stating that “the time heretofore granted to railroad and other transportation companies” to file applications for relief “be and the same is hereby extended to February 15, 1912.” It contained a further provision which counsel for plaintiff in error

contend authorized the collection after January 16, 1912, of the lower charge for the longer distance. This further provision is as follows:

“Until February 15, 1912, the railroad and other transportation companies *may file for establishment with the Commission* in the manner prescribed by law and in accordance with the Commission’s regulations *such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points:* Provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911, except when a longer line or route desires to reduce rates or fares to the most distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line. *The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.*”

*Like the order of November 20, 1911, it merely purported to give carriers permission to “file for establishment * * * such changes in rates and fares as would occur in the ordinary course of their business” and provided that said “changes” could specify higher rates at intermediate points. These “changes” are the supplements or amendments to their tariffs which are filed from time to time by the carriers, and the order purported to permit such supplements to specify higher rates at intermediate points. The order was in terms and effect precisely similar to the order of November 20, 1911. It related to the “changes” or supplements merely and had no refer-*

ence to the applications filed by the plaintiff in error on December 30, 1911. *It did not purport to grant any applications for relief, but purported merely to permit carriers in the supplements to their tariffs which they filed from time to time to specify higher charges to intermediate points.* It is not contended by plaintiff in error that any of the charges involved in this case were contained in any supplements filed in pursuance of such permission.

When the Commission made its orders of November 20, 1911, and January 16, 1912, it assumed that it was legal prior to October 10, 1911, for the carriers to maintain higher rates for the shorter distance. This Commission, however, has never stated why it assumed that the prohibition did not become operative when the Constitution was amended on October 10, 1911. It contained an absolute prohibition with a proviso that “upon application to the Railroad Commission * * * such company may in special cases, after investigation, be authorized to charge less for longer than for shorter distances for the transportation of property.” According to the view of the Commission expressed in the *Scott, Magner & Miller* case, any rates established by the Commission and in existence on October 10, 1911, which contravened the prohibition of Section 21, were legal. According to the assumption of the Commission, the status of such rates was precisely similar to the status of interstate rates in existence prior to June 10, 1910, upon which date Congress amended Section 4 of the Interstate Commerce Act so as to prohibit the charging of less for a longer than for a shorter distance, except when upon application of the carrier the Interstate Commerce Commission, after investigation and in special

the cases relieved carrier from the effect of the prohibition. But Congress, in order to prevent the prohibition going into effect at once, inserted a proviso reading as follows:

“Provided, further, that no rates or charges lawfully existing at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section, prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission.”

By its orders the Commission assumed the right to add to the prohibition and proviso of the Constitution a further proviso somewhat similar in effect to the second proviso of Section 4 of the Interstate Commerce Act which the people of California had not made a part of Section 21.

Not only is it clear that the order of January 16, 1912, did not grant the plaintiff in error the right to charge the rates specified in Paragraphs IV of each cause of action, but *it is equally clear that the Commission in making the order had not the slightest intention of granting any applications for relief. Its notice of October 26, 1912, its order of November 20, 1911, and the order of January 16, 1912, itself, positively and absolutely negative any such intention.*

The Commission assumed that the carriers had the right to continue to charge the lesser rate for the longer distance until such time as the Commission, in its discretion, should order them to cease. It as-

sumed that the tariffs on file October 10, 1911, specifying higher rates to intermediate points, were valid and that the amendment to the Constitution of October 10, 1911, did not of its own force prevent the carriers from charging more for transportation to intermediate points. The order of January 16, 1912, merely purported to permit the carriers to file supplements to such tariffs containing higher rates to intermediate points, provided the discrimination against the intermediate points was not made greater than that "existing" on October 10, 1911.

Counsel for plaintiff in error have spent much time in arguing that the Commission could conduct an "*ex parte*" investigation and have also referred to the statement of the learned Judge of the trial court to the effect that the Constitution required the orders for relief to be preceded by an investigation. But the learned Judge also held that irrespective of an investigation the orders did not authorize the charges involved in this action.

Even if the order of January 16, 1912, had in terms granted the plaintiff in error permission to charge the lesser rates for the longer distance, it would not have constituted an order of relief under the Constitution as *it expressly stated that the very matters which had to be determined by the Commission before such an order could be made were not determined.* Of course, as we have seen, the order did not purport to authorize the charging of any of the lesser rates for the greater distances mentioned in the complaint, or to grant any of the applications of the plaintiff in error. After granting the carriers permission to file for establishment with the Commission "such changes in rates and fares as would occur in the ordinary

course of their business," the order of January 16, 1912, provided (Record, Vol. 2, p. 426) :

"The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission *or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.*"

Before the Commission had jurisdiction to grant an order of relief, it was necessary that the applicant should prove and the Commission should find that the higher rate to the intermediate point was reasonable. We do not mean to say that an express finding was necessary, but we do mean that some substantial evidence must be introduced in support of the application before the Commission has jurisdiction to make the order of relief which presumes that such finding was made. The investigation provided for by the amended Section 21 of the Constitution was in its nature the same as that provided for by the amended Section 4 of the Interstate Commerce Act. *In construing the provisions of Section 4 the Interstate Commerce Commission has held that before an order of relief could be granted, the carrier must prove the alleged excuse for the lower charge for the greater distance, and also the reasonableness of the rate to the intermediate point.*

In *Re Application of Southern Pacific Company For Relief*, under the provisions of the Fourth Section 22, I. C. C. 366, 374, the Interstate Commerce Commission said:

"It would seem, therefore, fundamental in the enforcement of the fourth section, that a carrier

shall make proof, not only of water competition in this case, but of the reasonableness of the rates applied to intermediate points."

In the *Intermountain Rate Cases*, 234 U. S. 476, 485, the Supreme Court with reference to the duty imposed upon the Interstate Commerce Commission in the matter of the investigation provided for by the Fourth Section, said:

"the authority of the Commission to grant or request the right sought is made by the State to depend upon the facts established."

The provisions of the Fourth Section and of Section 22 of Article XII of the Constitution insofar as they relate to the investigation by the Commission are identical. The Fourth Section does not state that the power to grant relief depends upon the facts established; but such is the necessary result of the provisions in relation to the applications of the carriers and the investigation by the Commission. Moreover the provisions of the Interstate Commerce Act are not necessarily mandatory whereas those of the Constitution of California are.

We have never maintained, nor did the District Court hold, that the investigation had to be an investigation "corresponding to the procedure in a court of record." *The District Court took the only view possible considering the terms of the order, and the mandatory and prohibitory provision of the Constitution that an order of relief could be made only after investigation.*

Although the investigation contemplated by the Constitution may be *ex parte* in the sense that there

need be no adverse party represented thereat, *it is incumbent upon the applicant to show affirmatively a good and sufficient excuse for charging less for the longer distance and also to show affirmatively the reasonableness of the higher charge for the shorter distance.*

Although the only parties to the proceeding are the applicant and the Commission, representing the interests of the public, the Commission *must require the applicant to prove its case.* If substantial evidence is introduced by the applicant the courts cannot say that the Commission erred in granting the application in whole or in part as the duty of weighing the evidence is vested in the Commission, but upon the clearest principles of law an order of relief made by the Commission without the production of any evidence is made without investigation and is without jurisdiction and void. *The record in this case shows that not one iota of evidence was introduced on behalf of the plaintiff in error in support of its applications.*

The word "investigation" necessarily means in view of the fact that it follows the application of the carrier, that the Commission shall receive evidence as to the merits of the application.

The Commission could not take notice of the fact or extent of the alleged water competition at Los Angeles, nor could the Commission without evidence know what was a reasonable rate to the intermediate points. The opinion of the Commission referred to at the oral argument of this case states that "an extended investigation was made by the Rate Department of the Commission, under the Commission's instructions and supervision, with reference to the deviations from the long and short haul clause."

Such is clearly not the investigation contemplated by the Constitution. That investigation contemplates that the applicant shall present evidence in support of its application and in substantiation of the allegations thereof. All that the Commission had before it in the "investigation" conducted by its rate department were the tariffs on file and the applications stating that relief should be granted on certain alleged grounds.

An investigation as to the validity of these grounds was a jurisdictional prerequisite to any order authorizing the applicant to deviate from the prohibition. The Commission had not jurisdiction to make such an order without the investigation, and even if it had attempted to make an order granting relief such order would be annulled on *certiorari* upon proof that the investigation contemplated by the Constitution had not been made.

We do not believe that the Commission, when it made the orders of November 20, 1911, and January 16, 1912, for one moment supposed that they could make the order granting relief provided for by the Constitution without proof of the very matters referred to by the Interstate Commerce Commission and the Supreme Court in the *Intermountain Cases*, *supra*. The orders themselves clearly indicate that the Commission deemed that such proof should be made. The fact is the Commission, when it made such orders, assumed that it had the power pending investigation, to authorize deviations from the prohibition without investigation, or to put it another way, that the carriers were not obliged to observe the constitutional prohibition until the Commission so ordered. The Commission now realizes, that, in

making these orders, it proceeded under an erroneous view of the law and that such orders *cannot be sustained upon the theory upon which they were unquestionably made*. So realizing the Commission by its opinion filed on the 8th instant seeks to sustain them as orders made after investigation when, as a matter of fact, they were made under the belief that no investigation at all was necessary in order that they should be valid, and were never intended to be orders made after investigation.

~~The~~ The recent decision of the Supreme Court of California in *Great Western Power Co. v. Pillsbury*, 49 Cal. Dec. 667, was an application for a writ of *certiorari* to review an award made by the Industrial Accident Board. A provision of the Act conferred upon the Board power to make an award of damages to a person killed or injured, except in cases where the death or injury was caused by the willful misconduct of the person killed or injured. The Industrial Accident Board had found that one Mayfield was killed and that the killing was not the result of his willful misconduct. The award was set aside by the Supreme Court upon the ground that the evidence presented to the Board showed conclusively that such person had been guilty of willful misconduct. The Supreme Court said:

“When the Board had power to make and award only upon given facts, and there is no evidence whatever to show that existence of these facts a finding that they do exist cannot foreclose inquiry by a court under a writ of *certiorari*.”

So under Section 21 of Article XII of the Constitution where the order of the Commission granting

relief was made to depend upon an investigation an order granting relief without the investigation contemplated would be annulled on certiorari.

Not only does the evidence introduced in this case show that there was no investigation, but, as we have already seen, the order of January 16, 1912, expressly states that the "changes" filed by the carriers in pursuance of the permission granted by the order "will be subject to investigation and correction" and that the Commission "does not concede the reasonableness of any higher rates to intermediate points."

The order of January 16, 1912, purported to grant to carriers permission to file *thereafter* "changes in their tariffs containing higher rates to intermediate points." As the supplements were not filed at the time the order was made, it of course would have been impossible for the Commission to have determined that the rates to intermediate points therein to be specified were reasonable. The fact of the matter is, as most clearly appears from the order of the Commission, there was not the slightest intention on the part of the Commission that the order should in any sense be an order granting relief. The Commission assumed that pending the investigation and determination of the applications it had the power to permit the carriers to violate the prohibition of the Constitution. The order itself shows that the very matters, the determination of which were necessary to a relief order, were not passed upon by the Commission, nor indeed could they have been as the Commission was wholly in the dark as to what rates would be filed by the carriers in the supplements to their tariffs. As we have already seen there is no contention that any of the rates involved in this case were

specified in any of the "changes" or supplements which may have been filed by the plaintiff in error in pursuance of the "permission" granted by the order of January 16, 1912.

The opinion of the Commission in the *Scott, Magner & Miller Case* was rendered three months after this action was commenced. The proceeding in which the opinion was rendered was commenced after the filing in the State courts of the suits involving charges collected in violation of the constitutional provisions. It is the custom of the Railroad Commission in making investigations to notify all persons who may be even indirectly interested in the result so that such persons may, if they desire, be present to protect their interests. This organization comprising a large proportion of the shippers in the San Joaquin Valley, the persons most directly interested in the matters concerning which the Commission expressed its view, was never notified by the Commission or by plaintiff in error that that body had the legal phase of the matters under consideration and had no opportunity by their counsel to present any argument. Likewise in the matter determined by the Commission the day before the oral argument, no notification, formal or otherwise, was ever addressed to this organization or to its counsel, although the Commission knew that the learned Judge of the District Court had held that the orders introduced in evidence in this case did not constitute orders of relief under the Constitution, and also knew that the question was pending in this Court on writ of error to the District Court. Counsel for defendant in error knew nothing of the proceeding until the opinion filed therein was referred to at the oral argument. The complaint for reparation in the

case determined by the Commission on November 8th, was filed on October 22nd, the hearing was held on November 1st, and the decision rendered and opinion filed on November 8th, the day preceding the oral argument before this Court. This proceeding was begun while counsel for plaintiff in error were preparing their brief which was filed on October 29th. Never before in the history of the Commission, so far as we can learn, was a "contested" matter heard and determined with such extraordinary rapidity.

As stated above, the proceeding of *Fresno Traffic Association v. Southern Pacific Company, et al.*, was commenced on October 22nd. On October 25th the answer of the Southern Pacific Company was filed, which admitted all of the allegations of the complaint with the exception of the allegations that the claims were assigned to the plaintiff and the allegation that the Commission had not authorized the higher charge for the shorter distance. On the same day that the answer was filed the Commission made an order reading as follows:

"The Commission being of the opinion that public convenience and necessity require a hearing in the above entitled proceeding on less than 10 days' notice, you are hereby notified that a hearing has been set for Wednesday, October 27, 1915, at 10 A. M."

This notice and order was addressed to the parties to the proceeding. On October 27th the hearing was postponed to November 1st.

At the hearing on November 1st, Mr. Hill, one of the representatives of the complainant, stated that the complainant based its case upon the decision of Judge Van Fleet, rendered in the case at bar. There-

upon the defendants admitted the assignment of the claims as alleged in the complaint. The question then arose as to what, if any, evidence the complainant was required to present to the Commission.

Mr. Commissioner Loveland said:

“The order is for Mr. Hill to prove what he has claimed, and all he has to do is to introduce the decision of Judge Van Fleet; that proves it as far as he can prove it.”

Mr. Hill thereupon offered the decision of Judge Van Fleet in evidence, whereupon the defendants proceeded to show that the rate experts of the Commission had “investigated” the matter in the manner stated by the Commission in its opinion filed on November 8th.

When this testimony was all in Mr. Commissioner Loveland said: “Do you desire to submit this case or do you want to argue it, gentlemen?” Mr. Harris, representing the complainant replied, “I don’t think we do. Of course, it is submitted without argument, if that is the case, inasmuch as I am wholly unfamiliar with the matter.”

When the case was submitted Mr. Commissioner Loveland made the following statement:

“Now every one of the five members of this Commission believes that it made such investigation and issued such orders. All that was presented to Judge Van Fleet was the Commission’s orders that were read into the record. He was not shown that these orders were based upon a very, very serious and long continued investigation. We didn’t show that.”

Mr. Sanborn, one of the Commission's rate experts, testified on behalf of the defendants. In the course of giving his testimony Mr. Sanborn said:

“At that time you will recall, back in 1911, there was a hard and fast long and short haul provision * * * Every one advocated an amendment to the Constitution that would give the Commission permission or power to relieve the carriers from the absolute long and short haul provision.”

It is quite evident that the Commission did not receive its legal advice from Mr. Sanborn.

The above quoted statements are taken from the reporter's transcript of the proceedings on file with the secretary of the Commission.

Counsel for plaintiff in error contend that Section 18 of the Act of 1911 (the Eshleman Act), authorized the carriers, after the amendment to the Constitution of October 10, 1911, to charge a higher rate to intermediate points until the Commission should otherwise order. This contention is based on Section 18 of the Act of 1911 and the provisions of the amended Section 22 of Article XII of the Constitution referring to the Act of 1911. Section 18 of the Act of 1911 contains the following provision:

“All rates and charges for the transportation of passengers and freight, and all classification established by the Commission shall remain in effect until changed by the Commission.”

The amended Section 22 of Article XII contains the following provision with reference to the Act of 1911:

“The provisions of this section shall not be construed to repeal in whole or in part any existing law *not inconsistent herewith*, and the ‘Railroad Commission Act’ of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. *And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution* and of all other provisions adopted concurrently herewith.”

It is said that because of this reference to the Act of 1911 in Section 22, the carriers were entitled to ignore the prohibition of Section 21 against charging less for the longer distance until the Commission should “change” the rates in effect on October 10, 1911. This argument is based on the contention that higher rates to intermediate points were legal prior to October 10, 1911, and falls with that contention.

Assuming for the purpose of the argument that higher rates to intermediate points could be legally charged prior to October 10, 1911, the argument is equally unsound.

By the reference to the Act of 1911 in the amended Section 22, it was clearly intended that that Act and other existing acts should not be repealed by the amendment to the Constitution unless they were *inconsistent therewith*.

But higher rates to intermediate points were directly contrary to the provisions of the amended Section 21, which provided that they could be charged only when the Commission should so authorize after investigation.

The reference to the Act of 1911 in the amended Section 22 states that the Act of 1911 "shall have the same force and effect as the same had been passed after the adoption" of the amended sections of the Constitution. If the Act of 1911 had been passed after October 10, 1911, it would hardly be contended that the provision that "rates established by the Commission shall remain in effect until changed by the Commission" in any wise impaired or affected the long and short haul prohibition of the amended Section 21, adopted on October 10, 1911. The provision would be held to relate to rates *thereafter* established by the Commission.

The above quoted provision of Section 18 of the Act of 1911 did not really add anything to that Act as rates established by the Commission necessarily remained in effect until changed by the Commission. Such would unquestionably have been the construction of the Act of 1911 if that part of Section 18 had been omitted.

The provisions of the amended Section 21 of Article XII of the Constitution providing that upon "application to the Commission" a carrier "may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of property" are mandatory and prohibitory. Section 22 of Article I of the Constitution providing that, "The provisions of this Constitution are mandatory and prohibitory unless by express words they are declared to be otherwise," applies with all its force to the amended Section 21 of Article XII. Construing the provisions of Section 21 of Article XII in the light of the provisions of Section 22 of Article I, it follows

that an order of relief can be made only upon application, only after investigation, and only in special cases. The Constitution establishes the method of obtaining relief and that method is necessarily exclusive. In *Knight v. Martin*, 128 Cal. 245, the Supreme Court of California considered the provisions of Section 5 of Article XII of the Constitution, relating to the election and qualification of county officers. That section provides that the Legislature

“shall regulate the compensation of all such officers in proportion to duties, and for this purpose *may* classify the counties by population.”

In holding unconstitutional an act of the Legislature which attempted to fix the salaries of district attorneys without reference to the classification of the counties by population, the Supreme Court, after referring to the above quoted provision of the Constitution, said:

“When this language is considered with that of Article I, Section 22, of the same instrument, which declares that ‘the provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise,’ *the conviction is irresistible that the Constitution has prescribed a single mode which must be adopted and followed in fixing the compensation of officers, and that mode is to adjust the compensation in accordance with their respective duties under a classification of counties by population made for this purpose. To hold that the provision concerning classification of counties is permissive merely would be to deny to Section 22 of Article I its plain effect in a case calling for its application.*”

Counsel for plaintiff in error in their supplemental brief again assert that it was competent for the Com-

mission, after the amendment to the Constitution of October 10, 1911, to establish rates in violation of the long and short haul clause and in support of their contention cite *Pacific Telephone and Telegraph Co. v. Eshleman*, 166 Cal. 640.

As pointed out on page 118 of our brief, this contention is wholly irrelevant, as there is no claim that the Commission, after October 10, 1911, established any of the rates involved in this case.

Moreover, it is plain that such a statute would practically supersede or repeal the long and short haul clause of Section 21 of the Constitution as amended October 10, 1911, which requires that the higher rates to intermediate points can be changed only when upon the application of the carrier the Commission, after investigation, so authorizes. This matter was referred to at page 120 of our brief.

Counsel for plaintiff in error state in reply to our argument:

“That this does not follow under the decision of the California Supreme Court above referred to *Pacific Etc. Co. v. Eshleman*, supra, which holds that the section with regard to unconstitutionality only means that the Legislature may not curtail any of the powers vested by the Constitution in the Railroad Commission, and that the legislative authority to confer *any kind of additional* powers is plenary and unlimited by any constitutional provision.” (Supplemental Brief, p. 65.)

The provision of the Constitution referred to is as follows:

“No provision of this Constitution shall be construed as a limitation upon the authority of

the Legislature to confer upon the Railroad Commission *additional powers* of the same kind or different from those conferred herein, which are not *inconsistent* with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution.”

With reference to the charging of more for the shorter than for the longer distance the Constitution confers upon the Commission the power to investigate the application of the carrier for relief and in special cases, after such investigation, to authorize such charges, and from time to time to prescribe the extent to which the applicant might be relieved from the prohibition.

It is obvious that an act of the Legislature authorizing the Commission to establish higher rates for the shorter distance without the application or investigation required by the Constitution would be inconsistent with the Constitution.

The Supreme Court in *Pacific Etc. Co. v. Eshleman, supra*, did not, as counsel contend, say that the provision of the Constitution that the additional powers conferred upon the Commission by the Legislature should not be inconsistent with the Constitution only means that the powers so conferred must not “curtail” any of the powers vested in the Commission by the Constitution. There is no language used which can possibly be distorted into such a statement.

Necessarily an act curtailing the powers conferred by the Constitution would be inconsistent therewith.

So when with reference to a specific matter the Constitution itself has restricted the powers of the Commission by specifying their extent and the manner in which the Commission shall exercise them, any enlargement of its powers with reference to that matter would be equally inconsistent with the Constitution. If the contention of plaintiff in error were sound the Legislature could enact that in every case where an application for relief was filed it should be granted by the Commission. Such a provision would not "curtail" the power of the Commission, but it would be inconsistent with the powers conferred by the Constitution, and would in effect repeal the constitutional provision conferring upon the Commission certain powers and duties with reference to charges contrary to the prohibition of the Constitution.

In fact, the provision that the Legislature may confer "additional" powers not inconsistent with the powers conferred by the Constitution necessarily has application only to "additional" powers, and does not authorize any curtailment of the powers conferred by the Constitution. It provides that "additional" powers may be conferred provided they are not inconsistent with the powers conferred by the Constitution.

Counsel's statement quoted above to the effect that "the legislative authority to confer *any kind* of additional powers is plenary and unlimited by any Constitutional provision" entirely disregards the very terms of the provision, which only authorizes the conferring of *such kinds* of additional powers as are not inconsistent with the powers conferred by the Constitution.

From the foregoing, the following conclusions clearly appear:

1. That the order of January 16, 1912, did not purport to authorize the greater charge for the longer distance referred to in Paragraph IV of any of the causes of action numbered 86 to 120.

2. Assuming for the sake of the argument that it had so purported, the order would be void because the evidence shows that the Commission did not make the investigation required by the Constitution.

6. The Railroad Commission had no power to establish rates which contravened the Constitutional Provision, and if it assumed to do so its act was void.

Prior to the amendment of October 10, 1911, the Constitution provided that "Persons and property transported over any railroad or by any other transportation company or individual, shall be delivered at any station, landing or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing."

In the language of the Supreme Court of California, in *Matter of Maguire*, 57 Cal. 604, this constitutional provision "imposed a restraint on every law-making power in the state, whether an act of the legislature, or an ordinance or by-law of a municipal corporation. *It is a positive declaration, made by the sovereign authority, that whatever may be done under the legislature power, in any and every shape or form, shall never by direct or indirect action*" authorize a carrier to charge a greater sum for the transportation of the same class of property for a shorter distance than the carrier charges for such transportation for a longer distance over the same line in the same direction, or deprive any person transporting goods by a common carrier of the right to have his goods carried to any point at charges not exceeding those made for transportation to a more distant point.

The provision of the Constitution fixing the rate for the greater distance as the maximum legal rate for the shorter distance is most clearly worded, and the effect of the decisions of the Supreme Court of the State construing the provision of Section 22 of Article I of the Constitution to the effect that "The

provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise," is absolutely unmistakable.

Nevertheless further argument is made in the supplemental brief of the plaintiff in error that the Commission had the power to treat this constitutional provision merely as directory. It is said that it should be construed "*in pari materia*" with the provision of Section 22 of Article XII empowering the Commission to establish rates and that so construed the Commission had authority to establish rates in contravention thereof. As held by the learned Judge of the District Court:

"There is nothing in substance in the claim that Section 22, when construed *in pari materia* with Section 21, is a limitation upon the latter or in any respect modifies the provisions of the clause in question. Obviously the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21, and it is only rates so fixed that are to be deemed conclusively just and reasonable, either as an obligation upon or protection to the carrier. Any other interpretation of the sections would be in violation of cardinal rules of construction."

As said by the Supreme Court in *Matter of Maguire, supra*, "what is provided in one section may be restrained by the provisions of another."

In the supplemental brief it is said that the rate for the longer haul was established by the Commission. It is said the "carrier had no control over the through rate."

Heretofore, the plaintiff in error has been insisting that the Commission "established" the rate for the

shorter distance and that such "establishment" warranted the plaintiff in error in charging such rate, although a lesser charge was made for the greater distance. Now there is added the further contention that the lesser rate for the longer distance was also established.

Not until now did it occur to plaintiff in error to contend that the alleged establishment of the lesser rate for the longer distance was an excuse for charging a higher rate for the shorter distance. Nowhere in the pleadings is there any allegation that the lesser rate for the longer distance was established by the Commission. The complaint does not so allege nor is any such allegation contained in the answer or in any of the alleged separate defenses therein set up.

We may assume, however, that the lower rate for the longer distance was so established, but plaintiff in error is not helped one whit thereby. When the Commission established the lower rate for the longer distance, it became the maximum legal rate for the shorter distance.

The constitutionality of any rate established by the Commission is determined by the same rules which apply in the case of a statute passed by the Legislature. A rate established by the Commission is in legal effect a special statute.

If the Commission established a lower rate for the longer distance, such establishment by implication repealed all higher rates to intermediate points. If the Commission subsequently established a higher rate to an intermediate point, such establishment would impliedly repeal the lower rate to the more

distant point. If the Commission by a single order attempted to establish rates for both the shorter and the longer distances, and in so attempting provided that a higher rate should be charged for the shorter than for the longer distance, the whole order would be unconstitutional.

If, for example, there had been in existence a rate of 40 cents per hundred pounds from San Francisco to Bakersfield and a rate of 40 cents per hundred pounds from San Francisco to Los Angeles, and the Commission should subsequently establish the Los Angeles rate at 30 cents, the order would unquestionably have the effect of making 30 cents the maximum rate to all intermediate points.

If instead of establishing the Los Angeles rate at 30 cents the Commission had established the Bakersfield rate at 50 cents and made no order with reference to the Los Angeles rate, it would follow, the order being a later act of the rate making body, that the theretofore existing lower rate for the greater distance would be abrogated or repealed.

For the purpose of illustrating its contention, plaintiff in error refers to cause of action No. 119 (Record, Vol. 2, p. 328). In this cause of action it is alleged that plaintiff in error charged plaintiff's assignor 36 cents per hundred pounds on a shipment of rice from San Francisco to Fresno and at the same time charged $27\frac{1}{2}$ cents per hundred pounds for the transportation of rice from San Francisco to Los Angeles. Plaintiff in error state:

“Assuming, then, as we think must be assumed, that the $27\frac{1}{2}$ cent rate on rice from San

San Francisco to Los Angeles (rate pleaded in Count No. 119, Complaint, Record, Volume 2, p. 328) was a legally chargeable rate on that commodity for the through haul, because it was Commission-established and because no lower rate on rice existed from San Francisco to a point beyond Los Angeles, what then was the carrier's situation? The Commission had established, as we offered to show, the rate of 36 cents per 100 lbs. on rice from San Francisco to Fresno, a point intermediate San Francisco-Los Angeles, upon the collection of which Count 119 is based (Record, Vol. 2, p. 328). Claims defendant in error the 27½ cent rate was the lawful rate to Fresno as well as to Los Angeles, because we were then, under the compulsion created by the Commission-made rate, charging 27½ cents for the longer haul."

Assuming that the 27½ cent rate was as counsel say "commission-established," then it was in legal effect the commission-established maximum rate to all intermediate points on the same line and in the same direction.

If the 27½ cent rate was established as the Los Angeles rate by an order of later date than the order establishing the 36 cent rate to Fresno it impliedly repealed or abrogated the 36 cent rate and fixed the 27½ cent rate as the maximum rate that could be charged to Fresno. If on the other hand, the 36 cent rate to Fresno was established by an order of later date than the order establishing the 27½ cent rate to Los Angeles such order in effect established 36 cents as the legal rate to Los Angeles or at least abrogated or repealed such lower rate. If such were the case, the plaintiff in error voluntarily charged the 27½ cent rate to Los Angeles.

Whether the charging of the rate for the longer distance was "voluntary" or "involuntary" plaintiff's assignor was entitled to have his property transported for the shorter distance at charges not exceeding those made for the longer distance. If the lesser rate for the longer distance was the legal rate for the longer distance then it was also the legal rate for the shorter distance, and if the higher rate for the shorter distance was the legal rate for the longer distance then the carrier by voluntarily charging a less rate assumed the constitutional obligation to deliver the property of the assignor of defendant in error at charges "not exceeding the charges" made to the more distant point.

It is immaterial in what manner the result is arrived at. The Constitution conferred upon the assignors of plaintiff in error the right to have their property transported at charges not exceeding those made for the transportation of the same class of property for a longer distance over the same line in the same direction. The answer of plaintiff in error admits that they were deprived of that right and it is wholly immaterial under what pretext they were deprived of it.

Counsel for plaintiff in error say that if the legal rate to Fresno on the shipment of rice referred to was the $27\frac{1}{2}$ cent rate for the longer haul to Los Angeles that such $27\frac{1}{2}$ cent rate would also be the legal rate to Bakersfield which is 107 miles further from San Francisco than Fresno is, and to Mojave which is 175 miles further.

Such is unquestionably the result of the provision of the Constitution that property shall be delivered

at any station at charges not exceeding those made for the greater distance over the same line and in the same direction.

Plaintiff in error states:

“The through rate is claimed to be a non-elastic measure; the Commission-made intermediate rates pass away; nothing is left to regulation but the through rate.”

The rate to the more distant point is the “non-elastic” measure in the sense that it cannot be exceeded by the rate to the less distant point, but it is not “non-elastic” in the sense that rates to all intermediate points must be the same as the rate to the more distant point. Such is not the case for the rates to every intermediate point may be different, the only restriction being that they shall not exceed the rate to the more distant point. The statement that “nothing is left to regulation but the through rate” is palpably erroneous. The carrier (or the Commission in the event that that body in fact establishes the rates to the intermediate points) is given the widest discretion as to what such rates should be, subject only to the restriction that a lower rate shall not be charged or established to a more distant point. No “commission-made intermediate rates” pass away which are constitutionally established.

Plaintiff in error states:

“If the carrier were then obliged to charge not 36 cents but ‘charges not exceeding’ 27½ cents to Fresno, it might charge 25 cents to one and 26 cents to another, perhaps leaving the shipper to a remedy before the Commission for dis-

crimination between shippers at Fresno, but throwing the San Joaquin Valley Rate structure into chaos."

As we have already seen the publication of the 27½ cent rate for the longer distance in contemplation of law made that the maximum rate for all lesser distances. Of course, it had no effect on any published intermediate rate which did not exceed 27½ cents but such publication automatically reduced to 27½ cents any so-called published rate which in terms attempted to fix a higher charge than 27½ cents. In jurisdictions where a greater charge for the shorter than for the longer distance is prohibited by law such has been the uniform construction of schedules or tariffs specifying a lesser rate for the longer distance. After the amendment to the Constitution of October 10, 1911, the Railroad Commission erroneously assumed that they had the power to permit a greater charge for the lesser distance pending the filing of applications by the carriers and pending investigation, but they expressly conceded that when the prohibition was effective the lesser tariff rate for the longer distance became the maximum rate for all shorter distances. By its order of January 16, 1912, sought to ^{be} introduced in evidence by plaintiff in error, the Commission provided:

"As to any rate or fare as to which neither such schedule nor such application has been filed with this Commission by said date, the provisions of said Section 21, Article XII, of the Constitution, will at once become operative, *and the lower rate or fare for a longer distance will become the maximum rate or fare for all intermediate points on the same line or route for movements in the same direction, the shorter haul being included*

within the longer distance.” (Record, Vol. 2, p. 425.)

Of course a carrier might, as counsel suggest, charge one shipper at Fresno more than another for the same service, but if it did so it would be guilty of discrimination. And the discrimination would be of precisely the same nature as if some shippers were charged the tariff rate and some less than the tariff rate.

As already pointed out the contention that the lower rate to the more distant point was established by the Commission was reserved for the supplemental brief of plaintiff in error. Referring to the 27½ cent rate on rice from San Francisco to Los Angeles, counsel for plaintiff in error state:

“We were then under the compulsion created by the Commission-made rate charging 27½ cents for the longer haul.”

Not only is there no allegation in the answer that the rate for the longer distance was “commission-made” but the answer contains an affirmative allegation to the effect that it was voluntarily established by the plaintiff in error. In the first special defense (Record, Vol. 2, pp. 337, 338) it is alleged:

“That the City of San Francisco is and at all the times mentioned in said complaint was situated on tide-water, and that defendant’s freight terminal in the City of Los Angeles is and at all times mentioned in said complaint was situated within a comparatively short distance from tide-water, and connected therewith by rail so that common carriers by water competed freely with defendant in the carriage of freight between San

Francisco and the City of Los Angeles, of each and all of the properties and commodities described in Paragraph IV of each of plaintiff's separately stated causes of action. That the effect of such competition by said water carriers is, and was at all the times in said complaint stated, to hold down through rates by rail between San Francisco and Los Angeles, on all of the property and commodities referred to in plaintiff's complaint, and *to compel defendant to establish and maintain such through rates in competition with said water carriers and at less than a reasonable rate for the service performed.*"

At page 59 of the opening brief of plaintiff in error complaint is made that the District Court would not permit plaintiff in error to show that the through rate "was compelled by actual water competition between the port of San Francisco and the ports tributary to Los Angeles."

It does not follow, because the Constitution empowers the Commission to establish rates, that the Commission has established every rate which a carrier charges. In effect, Section 22 of Article XII of the Constitution vested in the Commission the power to establish rates theretofore vested in the Legislature. Before a rate became a Commission-made rate, the Commission would have to establish it by an order in effect similar to an act of the Legislature.

In the *Scott, Magner & Miller Case*, 2 C. R. C. 626, 635, the Commission had under consideration a case where no rate for the freight movement involved had ever been established by the Commission. The Commission assumed that by its order of June 11, 1909, "receiving for filing" the tariffs filed by the carriers

it had "established" the rates therein specified. It appeared that no rate for the movement involved was specified in these tariffs. The Commission said:

"There is no record that the Commission ever established any other rates to be charged by defendant and particularly none covering the movement in question, while the Wright Act was in effect * * * no action other than that of June 11, 1909, seems ever to have been taken during the period of the Wright Act as to any of defendant's rates in this State."

Referring further to the rates charged for the movements involved the Commission said:

"These rates were railroad-made and not State made rates."

In making the statement that the plaintiff in error was under the "compulsion" of charging the "commission-made" rate for the longer distance, counsel for plaintiff in error probably had in mind the provision of the Acts of 1909 and 1911, requiring the carriers to file their schedules of rates with the Commission, and providing further that the carriers should charge according to the rates specified in the schedules so filed, except where the Commission after investigation established other rates in lieu thereof. These statutes required carriers to file all their rate schedules with the Commission and provided that if the Commission did not approve of any rate proposed by the carrier, it might investigate the same and after a hearing establish a different rate in lieu thereof.

The Statute of 1909 (Stats. 1909: 499) which became effective March 19, 1909, provided (Sec. 18) that every carrier should file with the Commission

and publish schedules showing all its rates. Section 19 of the Act of 1909 provided for a hearing by the Commission and notice to the carrier before the establishment of any rate different from those contained in the schedules filed by the carrier. Section 18 of the Act of 1909 also contained a provision that "no carrier shall engage in the transportation of property unless the rates upon which the same is transported have been filed and published." Section 16 of the Act of 1909 provided:

"The said Board of Railroad Commissioners shall have the power, and it shall be their duty, to establish rates of charges for transportation by transportation companies subject to the provisions of this Act, and the order for the said rates so made shall take effect on the 20th day after the service of the same upon the transportation company affected thereby."

The filing of schedules under Section 18 did not constitute the rates therein specified Commission-made rates. The rates therein specified were carrier-made rates. They were not established by the Commission merely because the Commission did not establish other rates in lieu thereof.

The Constitution contained no provision requiring the Commission to notify the carrier prior to the establishment of any rate. It will be noted that the Act of 1909 went beyond the Constitution in providing for a hearing before the rates were established. It also went beyond the Constitution in requiring carriers to file with the Commission schedules of all their rates.

The Act of 1911 (Stats. 1911: 13) provided (Sec. 17) that within 60 days from the time the Act went

into effect all carriers should file complete schedules of their rates, and provided further that the Commission might establish such of said rates as it approved and that upon notice and after hearing it might establish others in lieu of those which it did not approve.

The provisions of the Acts of 1909 and 1911 differ but slightly. The Act of 1909 did not provide that the Commission should establish rates except in cases where it disapproved of the rate proposed by the carrier, whereas the Act of 1911 provided that the Commission should either approve the rates proposed by the carrier, or establish others in lieu thereof. The Act of 1911 contemplated a formal order establishing the rates proposed by the carrier, whereas the Act of 1909 did not.

At the trial plaintiff in error sought to introduce in evidence a letter written by plaintiff in error to the Railroad Commission under date of May 7, 1909, transmitting to the body "all tariffs published by the Southern Pacific Company which are in effect at this date." This letter was in answer to one written by the Railroad Commission to plaintiff in error "in regard to filing tariffs" with the Commission. (Record, Vol. 2, p. 517). These tariffs were transmitted for filing in pursuance of the Act of 1909 (Sec. 18) which became effective March 19, 1909, and which required every carrier "to file with the Commission and publish schedules showing all its rates."

At page 116 of the opening brief of plaintiff in error the statement is made that the list of tariffs specified in this letter "includes the tariffs evidencing all of the charges here in controversy."

Assuming the correctness of the statement of counsel that "all the charges here in controversy" were evidenced by the tariffs transmitted with the letter of May 7, 1909, from plaintiff in error to the Commission the situation was as follows: The rates involved in this action were established by the plaintiff in error some time prior to May 7, 1909. On that date tariffs containing such rates were filed with the Commission. On June 11, 1909, the Commission made its order to the effect "that the aforesaid schedules be and they are hereby received and filed by this Commission * * * and that said rates, fares and charges shall be published by said carriers respectively as required by the said Act, and shall be the lawful rates, fares and charges of said carriers respectively." (Record, Vol. 2, p. 530.) This order referred not only to the tariffs filed by plaintiff in error, but to those filed by about forty other carriers. The order of the Commission that "said rates and charges * * * shall be the lawful rates and charges of said carriers respectively" did not amount to an order "establishing" such rates. They became the lawful rates (provided they did not contravene the Constitution) because they were specified in the tariffs filed by the carriers in pursuance of Section 18 of the Act. The Act provided that upon the filing by the carriers of the schedules of their rates, the rates therein specified should be the lawful rates until others were established by the Commission in lieu thereof; the order of the Commission that they were the lawful rates was really superfluous.

Plaintiff in error, in effect, said to the Commission: "We are now charging the rates specified in these tariffs and in pursuance of the Statute of 1909

hereby file them with you." Nevertheless counsel say they were "commission-made" and that the plaintiff in error was "compelled" to charge accordingly. Clearly it is wholly immaterial whether the order of the Commission that they should be the "lawful rates" constituted them "commission-made" rates or not. Primarily and in effect they were carrier-made rates. If they were "commission-made" they were so made at the request of plaintiff in error, and if after the schedules were filed, plaintiff in error was "compelled" to charge them, such compulsion was the result of its own voluntary act in first establishing them.

Counsel for plaintiff in error say that "the California system absolutely negatives any theory of maximum rates and gives the carrier no right to vary from the rate fixed by the Commission." By this counsel mean that the carrier is not only forbidden to charge in excess of the established rate but he is also forbidden to charge less. It appears to be the contention of counsel that a constitutional or statutory provision that a carrier shall not charge *less* than the established rate is inconsistent with the provision of Section 21 of Article XII of the Constitution requiring that property be transported for a lesser distance at charges not exceeding those made for the longer distance. This contention was not made in the opening brief of plaintiff in error but is first made in its supplemental brief.

It is very certain that this contention will not bear analysis. Let us assume (which we shall hereafter show is not the fact) that the Constitution as it existed prior to October 10, 1911, contained a provi-

sion that no carrier should charge less than the rates established by the Commission. We have then the mandatory and prohibitory provision of Section 21 of Article XII that "property transported over any railroad shall be delivered at any station at charges not exceeding the charges for the transportation of property of the same class in the same direction to any more distant station." We have further the provision of Section 22 empowering the Commission to establish rates for the transportation of property, and (in the assumed case) the further provision that no carrier shall charge either more or *less* than the rates so established. (The fact is that the Constitution did prohibit the charging of more than the established rate but did not forbid the charging of less.) Counsel's contention is that the provision that the carrier shall not charge less than the tariff rate renders the provisions of Section 21 of Article XII merely directory and that the Commission in establishing rates may ignore the provisions of Section 21. But it is very apparent the assumed provision that the carrier shall not charge less than the established rate could not possibly have such effect. Its effect is no different than the provision that the carrier should not charge in excess of the established rate.

The effect of the provision of Section 21 of Article XII is very apparent. As said by the learned Judge of the District Court "obviously the rates which the Commission is empowered to fix under Section 22 are to be fixed in subordination to the prohibition found in Section 21. * * * Any other interpretation of the sections, would be in violation of cardinal rules of construction."

The restriction placed upon the carriers and the Commission by Section 21 was a very simple one. It merely required that no rates should be established or charged to a less distant point which exceeded the rates established and charged to a more distant point over the same line in the same direction. There is nothing ambiguous about the provision of Section 21 and neither the carrier nor the Commission should have had any difficulty in establishing tariffs which conformed thereto. A provision of law that no carrier should charge less than the rates established by the Commission would have had the same effect as the provision that no carrier should charge in excess of such rates. Both provisions would refer to rates established with regard to the provision of Section 21. Counsel say that if the lesser rate charged for the transportation from San Francisco to Los Angeles cannot be exceeded for transportation to Fresno that the carrier might charge one person at Fresno $27\frac{1}{2}$ cents (the rate on rice for the greater distance referred to in cause of action No. 119) and another 25 cents, thereby discriminating between shippers at Fresno. But if plaintiff in error had observed the provisions of Section 21 it would have specified in its tariffs which it filed with the Commission just what the rate to Fresno was and such rate so specified would not have exceeded the rate to Los Angeles. The opportunity which counsel say exists for discrimination is due entirely to the disregard of the law either by the carrier or the Commission in permitting a tariff to be published which specified a higher rate to Fresno. If the carrier had observed the law, such opportunity to discriminate by charging one shipper at Fresno more than another would not have existed for the Fresno rate would have been

specifically named in the tariff, and it would have been a rate not in excess of the rate to Los Angeles. The opportunity to discriminate to which counsel refer was due either to the disregard of the law by the plaintiff in error or by the Commission. Counsel's argument in effect is: The law has been violated, but the plaintiff in error should escape liability for violating it because the effect of such violation is to permit the plaintiff in error to further violate the law by discriminating between shippers at Fresno.

If the effect of the invalidity of the higher rate at Fresno was as counsel say "that there was no rate on rice from San Francisco to Fresno" such effect was due to a disregard of the provisions of Section 21, and any "chaos" that would have resulted from the fact that there was only a maximum rate to Fresno would also have been due to a disregard of the Constitution. It is obvious that plaintiff's assignors cannot be deprived of the right conferred by the Constitution because the plaintiff in error disregarded the law or because the Commission may have attempted to sanction such disregard.

If the Constitution as it existed prior to October 10, 1911, had provided that no carrier should charge less than the established rate and there had been no rate on rice from Fresno to San Francisco the constitutional provision would have simply been inoperative in that case. The "chaos" which counsel say would result from the fact that the Fresno rate was merely a maximum rate would have been due simply to the fact that neither the carrier nor the Commission had established a specific rate.

The provisions of Section 21 are as plain as the English language can make them and it is obvious that neither the Commission nor the carrier would have had the slightest difficulty in establishing rates which did not disregard them. The provisions were disregarded, and plaintiff's assignors have been damaged thereby. In support of the contention that the Constitution did not "mean what it said" counsel for plaintiff in error say that the disregard of the provisions might have given the plaintiff in error an opportunity to damage other persons. Analyzed, such is the sum and substance of this argument of plaintiff in error.

Counsel suppose a case where a shipment of rice originated on the Northwestern Pacific Railroad at Santa Rosa destined to Fresno on the line of plaintiff in error. They say that "in the absence of a joint through rate between the Northwestern Pacific and the Southern Pacific from Santa Rosa to Fresno the rate under obvious and familiar principles of rate construction would be the sum of the two local rates" and that "It is manifest that the Southern Pacific Company's proportion of a rate so constructed would be 36 cents from San Francisco to Fresno." But in this counsel are obviously in error for if the Southern Pacific Company were maintaining a $27\frac{1}{2}$ cent rate to Los Angeles, it would necessarily follow that the maximum rate to Fresno would be $27\frac{1}{2}$ cents. However, any controversy over such a matter would have been entirely obviated if the Southern Pacific Company had not attempted to violate the Constitution by specifying in its tariff a higher rate to Fresno than it charged to Los Angeles.

It is clear, however, that the Constitution as it existed prior to October 10, 1911, did provide that the rates established were maximum rates merely. The Statutes of 1909 and 1911 provided that the rates should not be deviated from by charging less, but the Constitution as it then existed did not. It is very clear that it is wholly immaterial here whether a carrier could charge less than the existing rate, and it is equally clear that the Legislature could not impair the right conferred by Section 21 to have property transported at charges not exceeding those made for the greater distance by enacting that a carrier should not charge less than the established rate.

The Constitution prior to the amendment of October 10, 1911, provided (Section 22, Art. XII) that the Commission "shall have the power to establish rates" and also imposed a penalty on any carrier "which shall fail or refuse to conform to such rates as shall be established by the Commission, or shall charge rates in excess thereof."

The Constitution prior to the amendment of October 10, 1911, contemplated the establishment of maximum rates by the Commission; it did not prohibit a carrier from charging less than the established rate. If a carrier desired to charge less than the rate established it was at liberty to do so, provided it did not discriminate against anyone. If the provision had read "which shall fail or refuse to conform to such rates as shall be established by the Commission" it might be argued that the charging of less than the established rate was prohibited, but the express provision against charging rates in excess of the established rates shows that it was not the intention to

prohibit the charging of lower rates than the established rates.

The Supreme Court of California construed this provision of the Constitution in *Edson v. Southern Pacific Company*, 144 Cal. 182, 188, and held that the Commission had power to establish *maximum* rates merely. In so holding Mr. Chief Justice Beatty who wrote the opinion of the Court said:

“We do not understand that the Railroad Commissioners do more than to prescribe the *maximum* rates allowable. Within that *maximum* a corporation may establish its own rates.”

The Statute of 1909 (Stats. 1909: 499) which became effective March 19, 1909, provided (Section 18) that “no carrier shall receive or charge greater or less compensation * * * than the rate specified in the tariffs which have been filed or published.” The Act of 1911 (Stats. 1911: 13) contained a similar provision (Section 40).

The Constitution as amended October 10, 1911 (Sec. 22, Art. XII), also prohibited the charging of a less rate than the rate established by the Commission so that on October 10, 1911, the prohibition against charging less than the established rate, which theretofore had been a statutory prohibition, became a constitutional one.

Counsel state it is “illogical not to say unfair” to “use as a subtrahend” a “State established rate,” and the further statement is made that it was “commercially impossible” to have charged for the longer distance the rate charged for the lesser distance, and

that it would have been "confiscatory" to have "reduced" the intermediate rate to the level of the rate for the longer distance.

If the Commission, without the consent of the carrier, had established a rate to Los Angeles which was so low as to be confiscatory, plaintiff in error would not have been under the obligation to observe it, either as the Los Angeles rate or as the maximum rate to intermediate points. But if the Commission, without the carrier's consent, had established the Los Angeles rate and the carrier, without objection, accepted it as the lawful rate to Los Angeles, it was under the constitutional obligation to carry to intermediate points at charges not exceeding the rate for the longer distance. The alleged "unfairness" of the constitutional provision is a matter with which the courts are not concerned. It was deemed to be fair by the people of California and similar provisions have been deemed fair by the people of various other states who have enacted similar constitutional provisions. The House of Representatives in the Federal Congress passed a bill which contained an absolute prohibition against charging more for the shorter than for the longer distance. In fact, the charging of more for a short than for a longer distance has been universally recognized as *prima facie* unfair. The provision of the Constitution, in effect, provided that no rate for the longer distance should be so much below a reasonable rate as not to afford reasonable compensation for the transportation to all less distant points. It was, in effect, declared to be contrary to public policy to permit a carrier to engage in competition at the long haul point, if its engaging in such competition had the effect of requiring it to fix a rate

at so much less than a reasonable compensation for the services performed that a similar rate would not be a reasonable compensation for the services performed in transporting to less distant points. It would be competent for the law making power to prohibit a carrier from charging less than a reasonable rate in any case, but the constitutional provision does not go to that extent. The right of plaintiff in error engage in this kind of competition with water carriers is subject to the restrictions imposed by the law making power. The people evidently deemed it was to the public interest to discourage competition between rail and water carriers where the engaging in such competition would require the rail carrier to render services for compensation considerably less than reasonable. They may also have been skeptical regarding the claims of the rail carriers that the rates made to meet such competition were in fact less than reasonable. They may have deemed it improbable that a rail carrier would voluntarily transport freight for less than a reasonable compensation. Whatever their views were, they did make the rate for the longer distance the maximum rate for all lesser distances over the same line in the same direction. Counsel say it is "unfair" but the consensus of opinion seems to be that it is eminently fair.

Plaintiff in error states:

"The utter confusion of counsel's argument arises from the fact that he has failed to recognize the radical distinction between the method of fixing interstate rates and the method of fixing California intrastate rates. The former are carrier-initiated and in most cases carrier-established maximum rates. The latter are Commission-initiated and established, and not maximum rates, but are moving rates—that is, rates which cannot be deviated from by the carrier."

Just to what extent California rates are "commissions-initiated" we have already seen. As we have also seen, the Constitution as it existed prior to October 10, 1911, did not prohibit the carrier from deviating from the established rates by charging less provided no discrimination resulted therefrom. The prohibition against charging less was first enacted by the Legislature in 1909. Under the Interstate Commerce Act once a tariff is filed with the Commission the carrier is prohibited from charging less than the tariff rate in precisely the same manner as he was prohibited by the Statutes of 1909 and 1911 and the Constitution as amended October 10, 1911. When the Interstate Commerce Commission establishes rates its order fixes the maximum rates, but as soon as the tariffs are filed in pursuance of the order the carrier cannot deviate from the rates therein specified by charging either more or less. Section 6 of the Interstate Commerce Act provides:

"Nor shall any carrier charge or demand or collect a greater, less or different compensation * * * than the rates, fares and charges which are specified in the tariffs filed and in effect at the time."

We are not conscious that there is any confusion in our argument and we believe it will be apparent to this Court that plaintiff in error has not pointed out wherein it is confusing. We maintained and the District Court held that neither the Commission nor the carrier could legally establish or maintain a higher rate for a less than for a longer distance over the same line in the same direction. Such is the obvious effect of the mandatory and prohibitory provisions

of Section 21, as construed by the Supreme Court.

Although we have endeavored in our brief already filed and also in this brief to reply fully to the numerous contentions made by counsel for plaintiff in error, we believe that much, if not all, of our argument was really unnecessary. We might have referred merely to the opinion of the learned Judge of the District Court which fully answers all of the contentions of plaintiff in error. It is very apparent that plaintiff in error has made no serious attempt to show that the views of the District Court were erroneous.

So with reference to this alleged distinction between the Interstate Commerce Act and our constitutional provisions, it is wholly immaterial in considering the effect of the provision of Section 21 whether the rates are initiated by the Commission or by the carrier, or whether or not the carrier may charge less than the established rate. The constitutional provision clearly was a restriction alike upon the Commission and the carrier. Whether the rates which the Commission was empowered to establish were "initiated" by the Commission or the carrier, the Commission could not constitutionally authorize a carrier to charge more for a shorter distance than for a longer distance over the same line in the same direction.

Counsel state that the provisions of Section 21 of Article XII "for more than thirty years had been treated by the public, the Commission and the carriers as controlled by the provision of Section 22, giving the Commission the power to fix rates." The statement is also made that "the Commission had estab-

lished thousands of rates prior to October 10, 1911, in which the long and short haul principle was not observed.”

If what counsel state were the fact, it would make not a particle of difference. A plain unambiguous provision of the supreme law of the State could not be rendered nugatory because for “thirty years” the carriers had succeeded in ignoring it, or because the Commission had failed in its duty, or because such of the public as were affected by its violation had submitted to the unlawful demands of the carriers. This contention in effect is that plaintiff in error acquired by prescription the right to violate the law and to deprive the assignors of defendant in error of their constitutionality conferred right to have their property transported at charges not exceeding those made for the longer distance.

It is not a fact that the Commission so construed the constitutional provision for “thirty years.” The first time that the Commission ever so construed it, as far as we can ascertain, was when it rendered its decision in the *Scott, Magner & Miller case* (2 C. R. C. 626) on April 15, 1913, which was about three months after this action was commenced. Moreover, in that case the Commission, although it expressed the view that the Constitution should be so construed, expressly stated that as the matter was not involved it would not consider it further (p. 631). If the Commission so “construed” the constitutional provision when on June 11, 1909, it received for filing the tariffs filed with the Commission by the plaintiff in error, we do not know that such is the fact as the order merely stated that the tariffs filed “were received and

filed * * * and that said rates, fares and charges shall be the lawful rates, fares and charges of said carriers respectively, subject to be changed by this Commission pursuant to the provisions of Section 19 of the aforesaid Act." The Commission had no discretion about "receiving and filing" them, and its statement that they should be the "lawful rates" was merely a statement of a conclusion of law. They became lawful rates (provided they did not violate the Constitution) when the schedules containing them were filed. The Commission probably assumed in making these schedules the carriers had observed the constitutional provisions. Prior to the enactment of the Statute of 1909 there was no law which required a carrier to file its tariffs with the Commission. By its order of June 11, 1909, the Commission merely received for filing certain tariffs filed with the Commission but made no attempt to establish any rates different from those proposed by the carriers. The "thousands of rates" referred to by counsel are evidently the rates specified in these tariffs or in other tariffs prepared and filed by the carriers.

The first order of the Commission establishing a rate was made on November 22, 1887. On that date the rate from San Francisco to Pajaro and Watsonville was ordered reduced ten per cent. In ordering the rate reduced the Commission expressly directed that the reduced rate should be the maximum rate to all intermediate points. The order provided:

"And in no instance, after the said ten per cent reduction, shall the reduced rate for the long haul be less than that charged for the shorter haul and that the reduced long haul rate shall be the maximum charge for the shorter haul."

(Vol. 1 of Minutes, pg. 32.)

For some reason which is not apparent the order reducing the rates was never put into effect.

Prior to the year 1908 the Commission had never established any rates except in a few isolated cases. This appears from the decision of the Commission in *Re Matter of Alleged Discrimination by Southern Pacific Company* (Decision No. 102 rendered January 12, 1909, Annual Report of Railroad Commission for the year 1908, pg. 51).

In that case the Railroad Commission decided, in view of the fact that before the date of the discrimination complained of the Commission had not except in a few isolated instances established any rates, that the penalties provided by the Constitution for charging rates in excess of the established rates could not be enforced. The Commission said:

“In the preparation for the investigation the Attorney General had carefully examined the records of the Board of Railroad Commissioners to ascertain if the Constitutional mandate that they should

‘Establish rates of charges for the transportation of passengers and freight by railroad or other transportation companies, and publish the same from time to time, with such charges as they shall make’

had been properly complied with. He found that prior to January, 1908, it had not, except in a few isolated cases, and after stating that fact in his argument, added:

‘It now follows, therefore gentlemen, that with the exception of such rates as the Com-

mission has established, the penalty cited in the Constitutional provision does not apply.'

It cannot therefore be said in this decision that the Southern Pacific Company has failed to move traffic in conformity with established rates, or has charged rates in excess thereof, because during the time comprehended in this investigation there were no established rates."

On January 17, 1908, the Commission passed the following resolution (Vol. 3 of Minutes, pg. 198):

"*Whereas*, it does not appear from the records of this Board that the rates in effect in this State have ever been established by the Board, and

"*Whereas*, such action on the part of the Board seems to be necessary to complete the placing of transportation companies within its control and jurisdiction, *Now Therefore Be It Resolved*: That the rates published by the various transportation companies in effect on their various lines, are hereby adopted as the rates of this Commission, subject to review and correction upon complaint and investigation."

Even after 1908 the Commission, as we have seen, merely "approved" the tariffs filed by the carriers. In so doing they may have assumed that if any of the tariffs specified a higher rate for a shorter distance than was specified for a longer distance the rate for the longer distance became the maximum rate for the shorter distance.

In 1908 the Attorney General of the State advised the Commission that it had no power to authorize the carriers to charge a higher rate for the shorter than for the longer distance.

We have the statement of counsel, made at page 116 of the opening brief of plaintiff in error, to the

effect that all the rates in controversy here were contained in the tariffs filed with the Commission on May 7, 1909. The fact is, however, that the lesser rates for the greater distance described in 119 out of the 120 causes of action set up in the complaint "became effective" after May 7, 1909. This appears from column 13 of plaintiff in error's Exhibit "A," appearing at page 375 of Volume 2 of the Record. In only one instance does this statement show that the lesser rate for the longer distance was "effective" prior to May 7, 1909. This instance is shown by the 23rd item in the statement. It there appears that the rate for the longer distance "became effective" June 29, 1908; but there is nothing to show that at that time it was a lower rate than the rate to the intermediate points. The statement shows that the higher rate to the intermediate points "became effective" on June 11, 1909, which was subsequent to the letter of May 7, 1909, transmitting the tariffs of plaintiff in error to the Commission for filing. In 71 out of the 120 causes of action the lesser rate for the longer distance "became effective" on some date in 1911.

7. That it was not incumbent upon the plaintiff below to prove that the Commission had not relieved plaintiff in error from the prohibition of the Constitution, because if such relief had been granted, it was a matter of defense which the law requires the defendant to plead and prove.

No reference to this matter is made in the supplemental brief of plaintiff in error.

8. No reparation order of the Railroad Commission was necessary in order to entitle the plaintiff, or its assignors, to maintain an action in the courts.

No argument is advanced by counsel for plaintiff in error in reply to the argument made under this head of our brief. Counsel merely reiterate the statement made in their opening brief that this action "cannot be maintained without first resorting to the Commission."

As we have seen, there is nothing either in the Constitution as amended October 10, 1911, or in the Public Utilities Act which so requires. On the contrary, the Public Utilities Act expressly authorizes an action in the courts for all violations of the Constitution and of the Act itself. Indeed there is a very serious question whether the Commission would have any jurisdiction to award reparation in a case such as this, or in a case where a rate higher than the tariff rate was charged. Not only did the District Court of Appeals in the case of *Southern Pacific Company v. Superior Court*, 20 Cal. App. 674, 686 (150 Pac. 397) hold that there was no necessity to obtain a reparation order from the Commission, but also stated that the courts had exclusive jurisdiction. The Court said:

"The jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief."

The District Court of Appeal was of the opinion that the provision of Section 22^a of the Constitution that "Nothing herein contained shall be construed to prevent the Railroad Commission from ordering and

compelling any railroad or other transportation company to make reparation to any shipper on account of the rates charged to said shipper being excessive or discriminatory” and the provision of the Public Utilities Act that “when complaint has been made to the Commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor,” related solely to cases where rate making questions were involved.

At the oral argument, counsel, in answer to a question asked by Judge Rudkin, made the following statement: “If in fact the rates contended for here were in excess of the lawful rate we do not claim that an action for an overcharge cannot be maintained.” (Oral Argument and Supplemental Brief, pg. 40.) Upon further consideration, counsel fear they admitted too much, for at page 100 of their supplemental brief they state: “It occurs to us in reading the transcript that possibly Judge Rudkin had in mind that assuming the through rate to be the lawful intermediate rate, as contended by defendant in error, the shipper might sue without first resorting to the Commission. Counsel for plaintiff in error did not and does not so concede.” In view of the fact that Judge Rudkin’s question followed the reference to the case of *Pennsylvania R. R. Co. v. International Coal Co.*, 230 U. S. 184, in which case the Supreme Court held the action maintainable in the courts with-

out any precedent action on the part of the Commission, we are at a loss to know just to what counsel supposed Judge Rudkin's question did refer.

Although counsel for plaintiff in error, in connection with this contention, refer in their supplemental brief to the Constitution and the Public Utilities Act, their contention here is based not upon Section 21 of Article XII of the Constitution providing that "nothing herein contained shall be construed to prevent" the Commission from ordering reparation on account of the collection of excessive or discriminatory charges, but upon Section 71 (a) of the Public Utilities Act which provides that when "the Commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount" the Commission "may order that the public utility make due reparation to the complainant therefor," and upon Section 71 (b) which provides that suit may be brought to recover the amount of the Commission's award.

The Constitution makes no reference to any suit on the order of the Commission. There is nothing in the Constitution which prevents the courts from entertaining actions to recover excessive or unlawful freight charges. This was directly held by the Supreme Court in *Southern Pacific Company v. Superior Court of Kern County*, 50 Cal. Dec. 36, 37, where the Court said:

"There is nothing in either the Constitution or any of the statutes of this State to warrant the conclusion that the courts may not entertain an action for the recovery of money paid for freight when the same was collected in violation of law. The subject matter of such an action is within the jurisdiction of the courts."

The case in the Supreme Court involved charges collected in alleged violation of the long and short haul provisions of Section 21 of Article XII of the Constitution, after the amendment of October 10, 1911. This decision conclusively disposes of any contention that there is anything in the Constitution, as amended October 10, 1911, ousting the courts of jurisdiction of actions to recover excessive or unlawful freight charges. As a matter of fact, however, such contention was never made by plaintiff in error. The contention is merely that a reparation order is necessary under Section 71 of the Public Utilities Act, and is based not upon the Constitution, but upon the statute. That contention is fully replied to in our brief and need not be further referred to here.

CONCLUSION.

Both in their brief and at the oral argument counsel have stated that the questions involved in this case are novel. We believe it is apparent to this Court that not one of the contentions of plaintiff in error raises a question that has not been determined time and time again by the courts. In fact the only novelty about the case, we respectfully submit, is the novelty of a number of the contentions of plaintiff in error. It appears to have been the aim of counsel for plaintiff in error to make every contention conceivable. In most instances, the contentions are apparently abandoned for no argument in this support has been offered in answer to the argument against them. Instead of attempting to sustain the contentions made, counsel in their supplemental brief have added new contentions. In our reply briefs we have endeavored to answer fully every contention made or point suggested by counsel, with the result that the briefs on file are very voluminous. Although we have replied at length to the contentions made we feel that it was really unnecessary to have done so as practically every contention is answered in the opinion of the learned Judge of the District Court.

It is submitted that plaintiff in error has advanced no argument which tends in the remotest degree to question the correctness of the judgment of the District Court, and it is respectfully submitted that that judgment should be affirmed.

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ALFRED J. HARWOOD,
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No. 2643.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY,
a corporation,

Plaintiff in Error,

VS.

CALIFORNIA ADJUSTMENT COM-
PANY, a corporation,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR ON RE-ARGUMENT

In Error to the United States District Court for the
Northern District of California, Second Division.

HOEFLE, COOK, HARWOOD & MORRIS,
ALFRED J. HARWOOD,

Attorneys for Defendant in Error.

Filed

JUL 27 1916

D. Alonickson,
Clerk.

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BRIEF OF DEFENDANT IN ERROR ON RE-ARGUMENT

The Court has indicated that it desires further argument in relation to the causes of action which accrued after the amendment to the Constitution of October 10, 1911.

This matter is discussed in Defendant in Error's brief at pages 103 to 123 inclusive and in Defendant in Error's Supplemental Brief at pages 30 to 55 inclusive. The matter was discussed under the following head, viz.:

“The evidence sought to be introduced by plaintiff in error fails to show that the Railroad

Commission relieved plaintiff in error from the provisions of Section 21 of Article XII of the Constitution against charging less for the longer than for the shorter haul."

In this brief we shall present the argument bearing on the causes of action which accrued after October 10, 1911, under the following heads:

1. *After October 10, 1911, it was unlawful for a carrier to charge a higher rate for the shorter distance, unless it had applied to the Commission for relief and its application had been granted by the Commission after investigation.*

2. *Neither the order of November 20, 1911, nor the order of January 16, 1912, purport to grant any of the applications of the defendant.*

3. *The orders of the Commission offered in evidence do not purport to be orders of relief made after investigation as they show affirmatively that the investigation was to be held in the future.*

At the last oral argument matters relating to the causes of action which accrued prior to October 10, 1911, were also referred to. After the conclusion of the argument to be made under the heads above enumerated we shall reply to the argument of Plaintiff in Error insofar as it relates to the causes of action which accrued prior to October 10, 1911. The argument will be made under the same heads as in the brief and Supplemental Brief of Defendant in Error.

1. AFTER OCTOBER 10, 1911, IT WAS UNLAWFUL FOR A CARRIER TO CHARGE A HIGHER RATE FOR THE SHORTER DISTANCE UNLESS IT HAD APPLIED TO THE COMMISSION FOR RELIEF AND ITS APPLICATION HAD BEEN GRANTED BY THE COMMISSION AFTER INVESTIGATION.

As held by Judge Van Fleet, it was unlawful for a carrier *prior* to October 10, 1911, to charge more for the shorter distance. This was the necessary result of Section 21 of Article XII of the Constitution reading “*Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing,*” and of Section 22 of Article I of the Constitution reading “*The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.*”

When the Constitution was amended on October 10, 1911, the absolute prohibition against charging more for the shorter distance was changed to a prohibition with a relieving clause which permitted the Railroad Commission to authorize carriers to charge more for the shorter distance where, upon application of the carriers, the Commission, in special cases, and after investigation, should so order. On October 10,

1911, the long and short haul provisions of Section 21 of Article XII were amended to read as follows:

“It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul.”

Even if there had been no long and short haul prohibition at all in existence prior to October 10, 1911, it is clear that after the amendment of October 10, 1911, it would have been unlawful for a carrier to charge a higher rate for a shorter distance in any case unless it had upon application to the Commission been authorized to do so.

This results from the terms of the amended Section. Necessarily it became effective as soon as it was approved by the people. Its terms were strongly prohibitory and the way was pointed out by which

a carrier could obtain relief from the prohibition.

If the member of the Legislature who drafted this amendment had himself been the author of the language used and had not had resort to any other statute as a model, the amended Section on the clearest principles of statutory and constitutional construction would be held to be a prohibition effective at once and that no carrier could lawfully charge rates in violation thereof unless it brought itself within the terms of the exception to the prohibition by applying to the Commission for authority to do so and by obtaining an order of the Commission, made after investigation, authorizing such charges.

But in proposing the amended Section 21 the Legislature resorted to Section 4 of the Interstate Commerce Act as amended June 18, 1910, as a model. The following parallel columns will show how Section 21 of the Constitution resembles Section 4 of the Act of Congress and how it differs therefrom:

<i>Section 21 of Article XII of Constitution, as amended.</i>	<i>Section 4 of Act of Con- gress as amended June 18, 1910.</i>
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“It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of

“That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passen-

property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates. Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul."

gers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through route than the aggregate of the intermediate rates subject to the provisions of this Act; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: Provided, however, that upon application to the Interstate Commerce Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section: *Provided, further, that no rates or charges lawfully existing*

at the time of the passage of this amendatory Act shall be required to be changed by reason of the provisions of this section, prior to the expiration of six months after the passage of this Act, nor in any case where application shall have been filed before the Commission, in accordance with the provisions of this section, until a determination of such application by the Commission."

It will be seen at a glance that the amended Section 21 follows Section 4 of the Interstate Commerce Act almost word for word until the second proviso of Section 4 (italicized in the above quotation) is reached and that this second proviso was discarded. By this second proviso Congress enacted that existing rates violative of the prohibition need not be changed for six months after the passage of the Act and that in case applications for relief were filed they need not be changed until such applications were determined by the Commission.

Clearly if this proviso had not been contained in Section 4 the prohibition would have become effective at once. The proviso was deemed necessary in order to prevent the prohibition becoming effective immediately.

Congress was prohibiting an act which was theretofore legal, whereas the people of California desired to permit in the future an act which was theretofore illegal, provided the carrier could satisfy the Commission that it was entitled to relief from the prohibition. The statement last made relates merely to the motives which impelled Congress in the one case to postpone in certain instances the effect of the prohibition, and the people of California in the other case to fail to include in the Constitution the second proviso of Section 4 of the Act of Congress.

Whether or not it was lawful prior to October 10, 1911, to charge a higher rate for a shorter distance, the people of California have indicated in the most clear and unmistakable manner that the prohibition should become effective at once, and that a higher charge for the shorter distance was unlawful unless the Commission had upon application of the carrier, and after investigation, granted permission to the carrier to exact such a charge.

Counsel for Plaintiff in Error consistently avoid making any reference to the matters referred to above; but contend that certain provisions of Section 18 of the Act of February 10, 1911 (Eshleman Act), had the effect (in spite of the language of the amended Section 21) of legalizing after October 10, 1911, rates violative of the prohibition.

This contention, of course, is based entirely upon

the further contention that the Constitution as it existed prior to October 10, 1911, permitted the Commission to establish and the carriers to charge higher rates for the shorter distance.

For the purpose of the argument, however, we will meet counsel on their own ground and will assume (directly contrary to the fact) that the long and short haul prohibition of Section 21 as amended October 10, 1911, was the first Constitutional enactment upon the subject.

This contention of Plaintiff in Error is based upon Sections 15 and 18 of the Act of February 10, 1911 (Eshleman Act), and upon the reference to that Act made in Section 22 of Article XII of the Constitution which was adopted on October 10, 1911, at the same time that the amendment to Section 21 of Article XII was adopted. This reference is as follows:

“The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the ‘Railroad Commission Act’ of this State approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said Act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith.”

The above quoted provision of Section 22 was inserted out of excess of caution in order that it might

not be held that by amending the Constitution in several material respects the people repealed the Act of February 10, 1911 (Eshleman Act).

Now it is clear that this reference to the Act of February 10, 1911 (Eshleman Act), in the amended Section 22 of Article XII of the Constitution had no other effect than to show the intent on the part of the people that the amendments to the Constitution should not operate to repeal or nullify that statute. The intent was clearly expressed that if *any part* of that act was *inconsistent with the Constitution that that part should be repealed*. The Act was placed on the same footing as if it had "been passed after" the adoption of the amendments to the Constitution.

Counsel say that Section 22 of Article XII of the Constitution made the Act of February 10, 1911 (Eshleman Act), a "part of the Constitution." But it is very clear that the reference to that act in the Constitution had no such effect. The Constitution did not make the act of February 10, 1911 (Eshleman Act), in any sense a part of the organic law; it merely provided that the act should be construed "with reference to" the constitutional provisions as amended, and that it should have the same force and effect as if it had been passed after the adoption of the amendments to the Constitution. The sole purpose of the reference was to prevent a repeal by implication.

Counsel for Plaintiff in Error refer to three pro-

visions of the Act of February 10, 1911 (Eshleman Act). The first reference is to the part of Section 15 reading:

“The Commission shall have power, and it shall be its duty, to establish rates of charges for the transportation of freight and passengers.”

Reference is also made to the provision of Section 18 that:

“The Commission may at any time abolish, alter, or in any manner amend any rate or classification upon notice and hearing.”

Counsel also refer to that part of Section 18 of the Act reading:

“All rates and charges for the transportation of passengers and freight, and all classifications established by the Commission shall remain in effect until changed by the Commission.”

As pointed out at page 122 of the Brief of Defendant in Error, Section 22 of Article XII of the Constitution as amended October 10, 1911, contains the same provisions as the Act of February 10, 1911 (Eshleman Act), with reference to the power of the Commission to establish rates. Section 22, as amended October 10, 1911, provided:

“Said Commission shall have the power to establish rates and charges for the transportation of passengers and freight by railroads and other transportation companies.”

It was wholly unnecessary for Plaintiff in Error to resort to the Act of February 10, 1911 (Eshleman

Act), for the purpose of locating the source of the Commission's power. Its only purpose in so doing was to confuse the argument. Plaintiff in Error desired to convey the erroneous impression that the power to establish rates was conferred by the Legislature and not by the Constitution, in order to argue that the power to establish rates was an "additional" power conferred upon the Commission by the Legislature in pursuance of the provision of Section 22 of Article XII authorizing the Legislature to confer upon the Commission "additional power" not inconsistent with the powers conferred upon the Commission by the Constitution. The further argument then follows that when the Legislature conferred upon the Commission the "additional power" of establishing rates such power in some unexplained way authorized the Commission to establish rates violative of the prohibition of Section 21 without the application or the investigation required by that section.

Now it is clear that it would make no difference whether the power to establish rates was conferred by the Constitution as amended October 10, 1911, or subsequently by the Legislature. The general power to establish rates coupled with the prohibition against establishing rates violative of the long and short haul prohibition is to be construed as preventing the establishment of rates violative of that prohibition. The manner in which a carrier may charge rates violative

of the prohibition is indicated by Section 21. The carrier was required to apply for relief; and if after investigation the Commission was satisfied that relief should be granted the Commission was empowered to authorize the carrier to charge rates violative of the prohibition.

The result would be the same if the Legislature and not the Constitution had conferred upon the Commission the power to establish rates.

It is very clear that the prohibition against charging more for the shorter distance controlled the general provision with reference to the establishment of rates. The Commission was empowered to establish rates but rates so established must be constitutional.

It was pointed out at page 122 of our brief that the power to establish rates was not conferred upon the Commission by the Act of February 10, 1911 (Eshleman Act), but by Section 22 of Article XII of the Constitution itself as amended October 10, 1911, at the same time that Section 21 was amended. Nevertheless at the last oral argument counsel for Plaintiff in Error again referred to the power to establish rates "given by Section 15 of the Eshleman Act."

The provision that rates established by the Commission should remain in effect until changed by the Commission was really superfluous, as rates established by the Commission necessarily remained in

effect until changed by that body. The power to establish rates was delegated to the Commission by the Constitution. A rate established by the Commission in pursuance of the power so delegated had the same effect as a statute establishing a rate would have had if the power to establish rates had been left with the Legislature. Whether established by the Legislature or by the Commission, a rate remained in effect until repealed or changed by the body authorized to establish it.

Even if the sections of the Constitution as amended on October 10, 1911, had incorporated therein a provision similar to the quoted provision of Section 18 of the Act of February 10, 1911 (Eshleman Act) to the effect that "rates established by the Commission shall remain in effect until changed by the Commission" such incorporation could not have in any manner impaired the effect of the prohibition of Section 21 against charging more for the shorter distance. Such a provision if it had been incorporated in Sections 21 or 22 would have been construed as relating to rates thereafter established by the Commission and would not be construed as in any manner impairing the strongly prohibitory language of the long and short haul clause of Section 21. Moreover, the provision would have been entirely superfluous, as rates established by the Commission would necessarily have remained in effect until changed by the Commission.

The part of Section 18 of the Act providing that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" if it had been incorporated into Sections 21 or 22, as amended October 10, 1911, would not have legalized any rates which the Constitution as so amended declared unlawful. *It would have related to rates thereafter constitutionally established by the Commission, not to rates theretofore established which the Constitution declared should be thereafter unlawful.*

It may be noted that this particular provision of the Act of February 10, 1911 (Eshleman Act) was not mentioned in either of the briefs of Plaintiff in Error. (Plaintiff in Error's original brief, pp. 56, 108; supplemental brief of Plaintiff in Error, p. 65.) The first reference thereto was made at the oral argument on the re-submission of the case.

We shall briefly summarize the parts of the Act of February 10, 1911 (Eshleman Act) referred to by Plaintiff in Error.

The provision of Section 15 referred to merely provides that the Commission shall have power to establish rates. A provision identical therewith is contained in Section 22 of Article XII of the Constitution as amended October 10, 1911.

The provision of Section 18 that rates established by the Commission should remain in force until

changed by the Commission was entirely superfluous, as such was the necessary consequence of their establishment by the Commission. If this provision had been contained in the Constitution itself as amended October 10, 1911, it would have added nothing thereto, and it could not possibly be construed as in any manner impairing the effect of the prohibition against charging more for the shorter distance. It would impair that prohibition not one whit more than it was impaired by the provision that the Commission should establish rates.

The provision of Section 18 of the Act that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" would not in any manner have impaired the effect of the prohibition of Section 21 if it had been incorporated bodily into the Constitution as amended October 10, 1911. It would have related merely to rates thereafter constitutionally established by the Commission. It would not have shown an intent on the part of the people that the prohibition of Section 21 should not become effective at once.

Now what counsel for Plaintiff in Error unconsciously contend for here is not merely that the Eshleman Act or the provisions of Section 18 referred to were incorporated bodily into the Constitution as amended October 10, 1911. This is the contention made by counsel; but it is apparent that this conten-

tion does not go far enough, as such incorporation would not help the Plaintiff in Error. To be of any service the contention would have to be, not only that the provisions of Section 18 of the Act were incorporated bodily into the Constitution, but that the provisions so incorporated were retroactive and governed and controlled the Constitution. The contention would have to be that the provision that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" should be construed as relating not only to rates to be established in the future, but also to rates established in the past, *notwithstanding that such rates established in the past were declared to be thereafter unlawful*. The construction contended for would necessarily have to be that this provision, if incorporated in the Constitution, nullified the prohibition of Section 21, and that notwithstanding the strongly prohibitory language of that section the Constitution as amended should be construed as having no reference to any rates which theretofore had been established by the Commission.

The result of this construction would be that the prohibition of Section 21 would be purposeless. Although it provided that no greater charge should be made for the shorter haul unless the Commission should upon the carrier's application grant authority therefor, it would (if counsel were correct) be read

with the proviso that no existing rates violative thereof should be affected thereby, but that such rates should continue to be lawful until after notice to the carriers the Commission should change them. The provision for an application by the carrier and an investigation by the Commission of the carrier's application would be nullified, as Section 21 would be construed not as requiring the carriers who sought relief to make application, but as requiring the Commission itself to initiate proceedings to "change" the rate. If the Commission did not initiate such proceedings and "change" the rates the carrier could continue to charge such rates for an indefinite period. As to such rates the prohibition of Section 21 would be entirely inapplicable and meaningless. The Constitution would be read as if the prohibition of Section 21 were non-existent, for wholly irrespective of that prohibition the Commission would have the power to change any rate theretofore established by that body.

Although the people rejected the proviso of Section 4 of the Act of Congress continuing existing rates in effect for six months, it is contended that the "existing" rates were continued in effect indefinitely—that the prohibition of Section 21 was totally destroyed insofar as it related to such "existing" rates.

Assuming for the purpose of the argument that higher rates for the shorter distance had been legal

prior to October 10, 1911, and that the Legislature and the people had wished to permit the carriers to continue to charge them after the adoption of the amendment and until the Commission had passed on the applications of the carriers, would they not have adopted Section 4 of the Act of Congress in its entirety? That is, would they have discarded the second proviso by which Congress accomplished that very purpose?

That the prohibition of the amended Section would have become effective at once would have been the necessary consequence of the language employed if such language had not been adopted from some other act. Even if there had been any ambiguity in the language (and there is not the slightest) the adoption of the first part of Section 4 of the Act of Congress and the rejection of the second proviso of that Section would beyond question have indicated the intention that the prohibition should become effective immediately.

The Legislature and the people had before them a model long and short haul clause which contained a proviso continuing existing rates in effect for six months, and, in case applications for relief were filed, until the determination by the Interstate Commerce Commission.

They rejected that proviso. Nevertheless, counsel say that by the reference to the Act of February 10,

1911 (Eshleman Act), in Section 22, they intended that certain provisions of that act should impair the effect of the strongly prohibitory terms of Section 21.

Let us assume that a carrier started in business after October 10, 1911. Would such a carrier be legally entitled to charge more for the shorter distance?

Clearly not, unless it had filed an application for relief and such application had been granted by the Commission, after investigation.

Such also would have been the effect of the Act of Congress, as the second proviso of Section 4 only authorized the temporary continuance of existing rates.

The people of California have not provided that any rates violative of the prohibition of the amended Section 21 can be lawfully charged. They have made no exception whatever to the prohibition. Yet counsel's argument leads to the result that a carrier in business at the time of the amendment could continue to violate the prohibition, but that a carrier who started in business subsequently to the amendment could not until he obtained a relief order from the Commission. But the Constitution contains no authority for this distinction. The prohibition is binding upon all and no carrier is entitled to charge the rates declared unlawful unless it brings itself within the terms of the proviso relating to applications to

and orders of relief by the Commission.

In construing the 4th Section of the Interstate Commerce Act, the United States Supreme Court in *United States v. Louisville & Nashville R. R. Co.*, 235 U. S. 314, 323, said:

“For the purpose of making the prohibition efficacious it was enacted that after a time fixed no existing rate of the character provided for should continue in force unless the application to sanction it had been made and granted. *Intermountain Rate Cases*, 234 U. S. 476.”

So here it is clear that by the amendment to the Constitution (which fixed no future time) it was provided that no rate of the character provided for should continue in force unless the application to sanction it had been made and granted.

Very recently a special United States District Court presided over by Hon. W. W. Morrow, Hon. M. T. Dooling and Hon. B. F. Bledsoe convened at San Francisco to hear the case of *Merchants & Manufacturers Traffic Assn. of Sacramento, et al., v. United States of America and Interstate Commerce Commission, et al.*, wherein the plaintiffs sought to enjoin an order of the Interstate Commerce Commission taking away terminal rates from Sacramento, Stockton and San Jose. The defendants contended that the order complained of was made in pursuance of the 4th Section of the Interstate Commerce Act. In holding that the order was void the Court said:

“Can the Commission suspend the long and short haul clause of Section 4 of the Act to Regulate Commerce without an application being made to it by the carriers for that purpose *and a hearing upon that particular application* as in a special case? We are of the opinion that this is beyond the statutory power of the Commission; and such we understand to be the decision of the Supreme Court of the United States in *U. S. v. L. & N. R. R.*, 235 U. S. 314, 322.”

This is even more clearly the case under our Constitution, for its provisions are mandatory and prohibitory, whereas those of the Interstate Commerce Act are not necessarily so, but may be directory merely.

In the case last cited the Special District Court had presented to it for determination the question as to whether the Interstate Commerce Commission had the power to authorize the charging of higher rates to intermediate points in a case where no application for permission to do so had been made by the carrier. The order taking away terminal rates from Sacramento and the other points was in effect an order permitting the carriers to charge more for the shorter distance.

A copy of the opinion of the Court in *Merchants and Manufacturers Traffic Assn. v. U. S.*, *supra*, is filed with this brief. 231 Fed. 292.

In *Mitchell v. Penn. R. R. Co.*, 230 U. S. 278, in a case which did not in any manner involve the 4th

Section of the Act of Congress, Mr. Justice Pitney in a dissenting opinion and by way of argument said :

“Clearly until the Commission acts the general prohibition (of Section 4) is unqualified, and when the Commission has acted its modification is as much law as the general prohibition was before.”

The “in pari materia” argument of Plaintiff in Error is authoritatively disposed of by the United States Supreme Court in *United States v. Louisville & Nashville R. R.*, 235 U. S. 314, *supra*. That case was an appeal from the Commerce Court. The Commerce Court had enjoined the enforcement of an order of the Interstate Commerce Commission holding that a certain reshipping privilege at Nashville violated Section 3 of the Interstate Commerce Act prohibiting undue and unreasonable preferences. (21 I. C. C. 186.) The Commission had found as a fact that the reshipping privilege was an undue and unreasonable preference. *The controversy both before the Commission and before the Commerce Court was as to whether or not the rebilling privilege constituted an unreasonable preference under Section 3 of the Act.* The Commerce Court assumed that it had jurisdiction to pass upon the matter and held that it was not an unreasonable preference. The decision of the Commerce Court was based upon the theory that in a case where the facts constituting the alleged unreasonable preference were undisputed it was com-

petent for the courts to pass upon the question as one of law. The Supreme Court held that the Commerce Court erred in holding that it had jurisdiction to pass upon a question of this kind. The Supreme Court held, however, that this error of the Commerce Court did not authorize the Supreme Court "to give effect to the order of the Commission without going further, since it must be determined whether the action of the Commission was repugnant to the Constitution, or in excess of the powers which that body possessed." (Page 321.) The Supreme Court then stated that if they undertook to consider these questions they would be confronted with a grave situation arising because of the manner in which the Commission had discharged its functions. It appeared that the Commission had received and acted upon evidence without any notice to the carrier as required by the Act of Congress. (Page 321.)

Continuing, the Supreme Court said that it was not necessary to determine whether there was an unreasonable preference under Section 3 of the Act, *as the evidence showed that the rebilling privilege constituted a violation of the long and short haul prohibition of Section 4 of the Act and that for that reason* (and not the reason upon which the Interstate Commerce Commission based its decision) *the rebilling privilege was illegal*. The Supreme Court, therefore, directed the Commerce Court to dismiss the bill of

complaint. The Supreme Court held that the rebilling privilege was illegal whether the Commission was right or wrong in its decision that it constituted an undue preference under Section 3 of the act, *and that it was illegal because in conflict with the long and short haul clause of Section 4*. In so deciding the Supreme Court (page 325) said:

“It is true that in argument it was said that the question here is whether there was a preference or discrimination under Secs. 2 and 3 of the act and not an inquiry under Sec. 4 and that a distinction between the various sections has been recognized. It has, indeed, been held that the provisions of Secs. 2, 3 and 4 of the act being *in pari materia* required harmonious construction and therefore they should not be applied so that one section destroyed the others and consequently that a lesser charge for a longer than for a shorter distance permitted by Sec. 4 could not for such reason be held to be either a preference or discrimination under Secs. 2 or 3. *Louisville & Nashville R. R. v. Behlmer*, 175 U. S. 648; *East Tenn., etc., Ry. v. Interstate Com. Com.*, 181 U. S. 1. *But the rule which requires that a practice which is permitted by one section should not be prohibited upon the theory that it is forbidden by another gives no support to the unwarranted assumption that that may be permitted which is devoid of all sanction and indeed is in direct conflict with all three of the sections—a result clearly arising in the case before us in consequence of the amendment of Sec. 4*. Indeed when the evil which it may be assumed conduced to the adoption of the amendment of Sec. 4 and the remedy which that amendment was intended to make effective are taken into view (see *Intermountain Rate Cases, supra*), it would seem that

the case before us cogently demonstrates the applicability of the amendment to the situation. *And it needs no argument to demonstrate that the application of the principle of public policy which the statute embodies is to be determined by the substance of things and not by names, for if that were not the case the provisions of the statute would be wholly inefficacious, as names would readily be devised to accomplish such a purpose."*

So here the provision that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing" if it had been contained in Section 21 or Section 22 of the Constitution would not be permitted to authorize that "which is in direct conflict" with the Constitution and "devoid of all sanction."

The "in pari materia" argument is employed by counsel for Plaintiff in Error both in support of the contention that before October 10, 1911, the Railroad Commission could establish rates which violated the mandatory and prohibitory provision of Section 21 as it existed prior to the amendment of October 10, 1911, and also in support of the contention that after October 10, 1911, rates violative of the long and short haul prohibition of the amended Section 21 could lawfully be charged because of the provisions of Section 18 of the Act of February 10, 1911 (Eshleman Act) that "The Commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing."

The first of these contentions is replied to in Defendant in Error's brief at pages 124 *et seq.* and in Defendant in Error's Supplemental Brief at pages 56 *et seq.* As this matter was not discussed at the re-argument, it will not be further referred to here.

At the oral argument counsel for Plaintiff in Error said:

“Whether you find for the railroad company or against it on the first class of causes of action (the reference is to those accruing prior to October 10, 1911), the fact remains that on October 10, 1911, according to counsel's own admission, there was at least one legal rate there, and that was the 27½-cent rate to Los Angeles, which we claim was compelled by conditions. Counsel say that rate should be observed as a maximum to intermediate points. Think what utter confusion would result if at one fell swoop by a constitutional enactment all of the intermediate rates, no matter whether carrier made or Commission made, are wiped out.”

It would seem from the foregoing that it was the intention of counsel to contend that even if higher rates to intermediate points were unlawful prior to October 10, 1911, they became lawful on that date. The language quoted above is the nearest approach that counsel make to this contention; they evidently hesitated to state it clearly. Counsel have not stated how there could have been any higher intermediate rates to “wipe out” on October 10, 1911. As higher rates to intermediate points were unlawful on and

prior to October 10, 1911, there were on that date no existing intermediate rates which were affected by the amendment to the Constitution.

If we concede for the sake of the argument that the amendment to Section 21 of October 10, 1911, was the first enactment prohibiting higher rates to intermediate points, and that on and prior to October 10, 1911, such rates were lawful, the only reply that need be made to the argument that confusion would result from the immediate operation of the law is that it might have been a good argument to address to the Legislature which proposed the law and to the people who enacted it; but it is not an argument which it is proper to address to the courts.

The argument that inconvenience would result from the immediate operation of the prohibition made by Plaintiff in Error at the last argument, wherein counsel referred to the instance of the so-called "existing" rate on rice of $27\frac{1}{2}$ cents to Los Angeles and the "existing" rate of 36 cents to Fresno, was fully replied to at pages 59 to 64 of Supplemental Brief of Defendant in Error.

It is wholly immaterial whether or not the Commission prior to October 10, 1911, established the $27\frac{1}{2}$ -cent rate to Los Angeles. If the $27\frac{1}{2}$ -cent rate to Los Angeles was established subsequently to the establishment of the 36-cent rate to Fresno, it became the maximum rate to Fresno. If the Fresno rate was

established subsequently to the establishment of the 27½-cent rate to Los Angeles, it abrogated the lower rate to Los Angeles. In no event could the Constitution be violated. The record in this case, however, shows that the lower rate to Los Angeles was not established by the Commission but was voluntarily established by the carrier (First Special Defense, Record, Vol. 2, pp. 337-8).

2. NEITHER THE ORDER OF NOVEMBER 20, 1911, NOR THE ORDER OF JANUARY 16, 1912, PURPORT TO GRANT ANY OF THE APPLICATIONS OF THE DEFENDANT.

Under the amended Section 21 three things are required before a carrier can charge more for the shorter distance. These are: (1) An application by the carrier, (2) an investigation by the Commission, and (3) an order in a special case authorizing the carrier to charge less for the shorter distance.

The applications of Plaintiff in Error were not filed until December 30, 1911, so we are not concerned with the order of November 20, 1911. The order of January 16th is as follows (Tr. p. 426):

“Until February 15, 1912, the railroad and other transportation companies *may file for establishment with the Commission* in the manner prescribed by law and in accordance with the Commission’s regulations *such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points.*”

This order relates merely to the filing of amendments or supplements to the tariffs. It purports to permit carriers to file amendments or supplements containing higher rates to intermediate points. The part of the order reading “continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points” is a part of the provision that the carriers “may file for establishment

with the Commission * * * such changes in rates and fares as occur in the ordinary course of their business." It immediately follows such provision and can relate to nothing but the "changes," which the carriers are permitted to file for "establishment." If it were omitted the order would mean nothing, as it would then read "railroad and other transportation companies may file for establishment with the Commission in the manner prescribed by law, and, in accordance with the Commission's regulations, such changes in rates and fares as occur in the ordinary course of their business." In no possible view was such an order necessary, as the law prescribes the manner of filing such changes. The order clearly shows that the Commission deemed that when a "change" was made in a rate which was contrary to the constitutional prohibition that some sort of permission was necessary if the rate changed remained contrary to the constitutional provision. The clause reading "continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points," is a part of and depends upon the subdivision of the sentence or clause the subject of which is "railroad and other transportation companies," the predicate "may file" and the object "changes." The English language will not permit the words to be accorded any meaning other than that the "changes" filed with the Commission may continue

higher rates or fares to intermediate points. "Continue" in the sense that the word is here used means "to retain" and the present participle "continuing" means "retaining." (Webster's International Dictionary.) The part of the sentence quoted above means the same as if it read "retaining, under the present rate bases or adjustments, higher rates or fares at intermediate points."

After making the above provisions relating to the filing of "changes" containing higher rates to intermediate points the order provided in the following paragraph "The Commission does not hereby indicate that it will finally approve any rates and fares *that may be filed under this permission,*" showing clearly that the order related to "changes" in rates to be *thereafter* filed by the carriers.

While it is clear that the order of January 16, 1912, does not purport to grant any of the applications of the carriers but merely purports to permit them to file "changes" containing higher rates to intermediate points, it will not be out of place to review the various orders of the Commission made in the matter of the constitutional provision. All of these orders were made in a case numbered 214 upon the records of the Commission. Before doing so, however, two facts should be kept in view. First, that the Commission adopted the erroneous view that it had the right prior to October 10, 1911, to establish

rates which violated the absolute prohibition of the Constitution, and, second, that the prohibition of Section 21 of Article XII, as amended October 10, 1911, did not become "operative" until the Commission should so order. The first of these errors is shown by the Commission's decision in the *Scott, Magner & Miller Case* (*Scott, Magner & Miller v. Western Pacific Railway Co.*, Decision No. 579, 2 C. R. C. 626), which is referred to at length at pages 133 to 145 inclusive of the brief of Defendant in Error.

The second error is shown by the order of January 16th itself. This order provides that if the applications for relief are not filed by February 15th the provisions of the Constitution "will at once become operative." Not only is such error evidenced by that order, but it is apparent from the notice of October 26, 1911, and the order of November 20th, 1911.

Now with these two errors as a basis for their acts, let us see what the Commission did after the adoption of the amendment of October 10, 1911, to the Constitution. They waited until October 26th before taking any action and on that date gave the notice bearing that date, a copy of which appears in the Transcript at page 299. This notice recites that the carriers have on file tariffs containing rates violative of the constitutional prohibition and directed the carriers to file either new schedules removing such discrimina-

tion or applications for relief. The notice stated that such schedules or applications should be on file on or before January 2, 1912.

On November 20, 1911, *before any applications for relief had been filed*, the Commission made an order (Exhibit No. 5, Tr. p. 404) reading as follows:

“Permission is hereby granted to railroads and other transportation companies until January 2d, 1912, to *file for establishment with the Commission in the manner prescribed by law and in accordance with the Commission’s regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided*, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.

“The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2d, 1912.”

It will be noted that the order of January 16, 1912, is practically identical with the order of November 20, 1911.

On December 30, 1911, the defendant filed its applications for relief.

On January 2, 1912, Case No. 214 came on for hearing before the Commission. A general discussion was held, but no evidence was introduced and the meeting adjourned without day. (Record p. 423.)

Next followed the order of January 16, 1912, referred to above.

The order of January 16, 1912, purported to grant to carriers permission to file *thereafter* "changes in their tariffs containing higher rates to intermediate points." As the supplements were not filed at the time the order was made, of course it would have been impossible for the Commission to have determined that the rates to intermediate points therein to be specified were reasonable. The fact of the matter is, as most clearly appears from the order of the Commission, there was not the slightest intention on the part of the Commission that the order should in any sense be an order granting relief. The Commission assumed that pending the investigation and determination of the applications it had the power to permit the carriers to violate the prohibition of the Constitution. The order itself shows that the very matters, the determination of which were necessary to a relief order, were not passed upon by the Commission, nor indeed could they have been, as the Commission was wholly in the dark as to what rates would be filed by the carriers in the supplements to their tariffs. As we have already seen, there is no contention that

any of the rates involved in this case were specified in any of the "changes" or supplements which may have been filed by the defendant in pursuance of the "permission" granted by the order of January 16, 1912.

It is not conceivable that the Commission when it made its orders of November 20, 1911, and January 16, 1912, for one moment supposed that it could make *the order granting relief provided for by the Constitution* without an investigation comprising an inquiry into the reason for the lower rate for the longer distance and the reasonableness of the higher rate for the shorter distance. The last paragraph of each order clearly shows that the Commission deemed that such proof was a necessary prerequisite to an order of relief. The fact is that the Commission when it made these orders assumed that the constitutional prohibition did not become operative in case applications were filed until the Commission had determined or passed on such applications. Nevertheless, the Commission was of the opinion that if a carrier wished to file a change in any "existing" rate, which change contained a rate violative of the constitutional prohibition, that some order of the Commission was proper before this could be done; hence the order of November 20, 1911, and the corresponding part of the order of January 16, 1912.

Every act which the Commission performed in

Case No. 214 shows the intent with which the order of January 16, 1912, was made. We may again refer to the order of November 20, 1911, which is in precisely the same terms as the order of January 16th, but which was made before any applications for relief had been filed and before the expiration of the time within which such applications were required to be filed by the notice of the Commission dated October 26, 1911. The order of January 16th is merely a continuation of the order of November 20th. Neither of these orders in any manner whatsoever relates to the granting in whole or in part of any of the applications for relief from the prohibition of Section 21 of Article XII of the Constitution.

The proviso relating to a relief order by the Commission was mandatory and prohibitory. (Sec. 22, Art. I of Const.) It provided the exclusive means of obtaining relief. Such would have been the effect of the proviso in Section 21 in the absence of the provision of Section 22 of Article I. The general rule of law governing the construction of provisos is stated in *Appeal of Clark*, 58 Conn. 207 (20 Atl. 456), as follows:

“A proviso in a statute is to be construed strictly, and takes no case out of the enacting clause, which is not fairly within its terms.”

At the oral argument counsel for Plaintiff in Error stated that in the Supplemental Brief of Defendant

in Error complaint was made that the Defendant in Error was "not notified of any of these proceedings." No complaint was made that the Commission had not notified the Defendant in Error of these proceedings. No one was entitled to notice of these proceedings. They were public in their nature and every one was charged with notice.

The only complaint made was that the Commission did not notify counsel for Plaintiff in Error of the pendency of the reparation case of *Scott, Magner & Miller Company v. Western Pacific* and of the reparation case of *Fresno Traffic Association v. S. P. Co. and A., T. & S. F. Ry. Co.*

In the early part of 1912 a large number of the shippers of the San Joaquin Valley combined for the purpose of recovering excessive freight charges exacted by the carriers in violation of the constitutional provisions as they existed both prior and subsequent to October 10, 1911. These shippers employed counsel and organized the California Adjustment Company, the Defendant in Error herein, to whom, for the purpose of convenience, they assigned their respective claims.

The Railroad Commission knew of the existence of this organization and knew of the decision of Judge Van Fleet to the effect that the Southern Pacific Company had not proved that it was relieved from the prohibition of the Constitution as amended October

10, 1911. They knew that the case was pending before this Court on writ of error and that it was set for hearing on the 9th of last November. On October 23rd last the reparation proceeding of Fresno Traffic Association was begun and on the 8th of November, the day preceding the hearing of this case, the Commission filed its opinion, which is printed at pages 43 *et seq.* of the Supplemental Brief of Plaintiff in Error. Although the avowed intention of the Commission at this proceeding (see pages 45-48 of Supplemental Brief of Defendant in Error) was to pass on Judge Van Fleet's decision, the Commission did not notify counsel for the shippers represented by the California Adjustment Company, the Defendant in Error in this case, of the pendency of this reparation proceeding or intimate to them that argument on the shippers' side of the legal question involved would be desirable, although it is the custom of the Railroad Commission so to notify counsel for organizations of shippers whenever it is supposed that a pending matter may interest such organizations.

The attitude of the Railroad Commission is wholly immaterial. The matter is referred to again solely because of the erroneous statement made at the oral argument to the effect that we complained that the California Adjustment Company was not notified of the proceeding initiated by the applications of the carriers for relief from the prohibition of the Constitution as amended October 10, 1911.

3. THE ORDERS OF THE COMMISSION OFFERED IN EVIDENCE DO NOT PURPORT TO BE ORDERS OF RELIEF MADE AFTER INVESTIGATION, AS THEY SHOW AFFIRMATIVELY THAT THE INVESTIGATION WAS TO BE HELD IN THE FUTURE.

The order of January 16, 1912, shows on its face that the investigation provided for by the Constitution was not held prior to the date of the order. This was the ground upon which Judge Van Fleet based his decision that it was not an order of relief under the Constitution. Judge Van Fleet said (Record p. 396):

“That order expressly shows they had not made any investigation up to that time because they fixed a future date for the investigation.”

The order of January 16, 1912, contains the following provision (Record p. 426):

“The Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be subject to investigation and correction.”

The order states that “all of which rates and fares will be subject to investigation and correction,” and that the Commission “does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rate to intermediate points.”

Argument is unnecessary to show that this is not an order made after investigation, as it shows on its face that the investigation was to be had in the future.

In the *Intermountain Rate Cases*, 234 U. S. 476, 485, the Supreme Court said:

“The authority of the Commission to grant or refuse the right sought is made by the statute to depend upon the facts established.”

In re *Application of S. P. Co. for relief from provisions of the Fourth Section of the Interstate Commerce Act*, 22 I. C. C. 366, 374, the Commission, per Mr. Commissioner Lane, said:

“It would seem therefore fundamental in the enforcement of the 4th Section that a carrier shall make proof *not only of water competition, but of the reasonableness of the rates applied to intermediate points.*”

See also:

L. & N. R. R. Co. v. U. S., 225 Fed. 571, 580.
(C. C. A.)

The order of November 20th contains provisions identical with those of the order of January 16th quoted above (Record p. 404).

The Railroad Commission has never claimed that the order of November 20, 1911, or the order of January 16, 1912, were orders of relief under the Constitution. All that the Commission has ever claimed is that they were orders made to “maintain the *status*

quo” pending investigation. This is clearly shown by the opinion of the Commission in *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677, cited by Plaintiff in Error at the oral argument. In that case the Commission said:

“The Commission’s order of October 26, 1911, in the long and short haul proceeding (Case 214), issued under authority of Section 21, Article XII of the Constitution, as amended on October 10, 1911, and in pursuance of which the defendant’s application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing, or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. *By this order the carriers were impliedly granted permission for practical reasons to maintain the status quo until the Commission passed upon such applications. By a subsequent order issued on November 20, 1911, in the same proceeding, express permission so to do was given.*”

For “practical reasons” the Commission “authorized” the carriers to maintain the “*status quo*”—that is, the Commission sought to assist the carriers to violate the constitutional prohibition. The so-called “*status quo*” was wholly illegal. Even if it had been legal, the amendment of October 10, 1911, which necessarily became operative at once, would have rendered the “*status quo*” illegal.

In no opinion has the Commission referred specifically to the order of January 16, 1912, but in the

Scott, Magner & Miller case, 2 C. R. C. 635, the Commission referred to an order made on February 15, 1912, as follows:

“Acting under the authority granted by Section 21 of Article XII of the Constitution as amended, the Commission heretofore, on February 15, 1912, issued its order in Case No. 214, authorizing the carriers of the State to continue their deviations from the long and short haul clause *until the Commission could determine definitely the instances, if any, in which it will permit deviations to continue to be made.* While the Commission’s order authorizing the temporary continuance of the deviations remains in effect, no cause of action can arise from alleged violations of the long and short haul provision of the Constitution.”

The order of February 15, 1912, is not in evidence in this case. This is the order referred to by the Commission in its opinion rendered on the 8th day of last November, the day preceding the first argument of this case. It will be noted that this reference to the order of February 15th clearly indicates that it was not an order of relief made after investigation. However, we are not here concerned with that order, as it was not offered in evidence by Plaintiff in Error.

Nor has the Plaintiff in Error ever contended that the Commission granted relief. The whole argument of Plaintiff in Error is predicated upon the erroneous assumption that after the amendment of October 10, 1911, carriers were legally entitled to violate the pro-

hibition of Section 21 until they were ordered to desist by the Commission. The contention of Plaintiff in Error is stated in its brief at page 108, as follows:

“That the Commission did pursuant to the power given it by the Eshleman Act, Section 15, to fix rates, actually make a series of orders, some of them preceding the filing of petitions for relief from the long and short haul clause and some of them afterward, but all of them with the intention of preserving the status of the rates then being charged by Plaintiff in Error, until it could be determined by the Commission whether, and, if so, to what extent, it was entitled to relief.”

There is no contention here that the evidence offered by Plaintiff in Error tended to support the separate defense to the causes of action which accrued after October 10, 1911. That defense (Record p. 342) is as follows:

“For a seventh further and separate defense defendant states that as to each and all of the shipments referred to in plaintiff’s separately stated causes of action, which moved or were delivered after October 10, 1911, the Railroad Commission of the State of California, pursuant to Section 21, Article XII, California Constitution, as amended October 10, 1911, authorized defendant, after investigation, to charge more for the shorter distance to the point intermediate San Francisco and Los Angeles to which such shipment was transported than for the longer distance in the same direction.”

Unquestionably this was a valid defense to the causes of action which accrued after October 10, 1911, and it was so deemed by the trial court. But the evidence offered did not sustain it, and in fact Plaintiff in Error does not contend that the offered evidence sustained it.

Not only does no order offered in evidence show that Plaintiff in Error's applications were granted, but it was so admitted at the trial, where counsel for Plaintiff in Error made the following admission:

"These petitions may be considered to have been pending until May 27, 1912. They had not been specifically acted upon either prior to that time or since that time, except insofar as the decision in Case No. 116, which I am going to offer shortly, may be considered to have affected them." (Record p. 406.)

4. THAT THE LONG AND SHORT HAUL PROVISION OF THE CONSTITUTION OF 1879 DOES NOT IN TERMS ATTEMPT TO REGULATE INTER-STATE COMMERCE, AND EVEN IF IT WERE SUSCEPTIBLE OF SUCH CONSTRUCTION, IT COULD NOT BE SAID THAT THE PEOPLE WOULD NOT HAVE PROHIBITED THE CHARGING OF MORE FOR THE SHORT THAN FOR THE LONGER HAUL WITHIN CALIFORNIA HAD THEY KNOWN THAT THEY COULD NOT ENFORCE SUCH A PROHIBITION IN THE CASE OF INTER-STATE COMMERCE.

This matter is discussed at pages 8 *et seq.* of the brief of Defendant in Error and at pages 2 *et seq.* of Supplemental Brief of Defendant in Error.

At the re-argument Plaintiff in Error cited the case of *C. M. & St. P. Ry. Co. v. Rock County Sugar Co.*, 156 N. W. 607 (Wis.)

C. M. & St. P. Ry. Co. v. Rock County Sugar Co., 156 N. W. 607 (Wis.), is practically the same as the Vermont case of *Sargent v. Rutland Railroad Co.*, 85 Atl. 654, cited by Plaintiff in Error in its brief and referred to at pages 15 to 17 of brief of Defendant in Error. Like the Vermont case, it involved a demurrage statute which in terms purported to govern demurrage on cars in both interstate and intrastate commerce. The Supreme Court of Wisconsin said:

“The statute purports to include all cases of shipments, whether local or interstate.”

From an inspection of the statute the Court reached

the conclusion that it “affects interstate commerce principally.”

As Congress has legislated on the subject of demurrage on cars in interstate commerce, the Court necessarily reached the conclusion that as applied to interstate commerce the statute was unconstitutional. The question then presented itself as to whether it could be enforced as to cars in intrastate commerce. The Court reached the conclusion, in view of the terms of the statute, that it could not be said that the Legislature would have enacted the statute if it knew that it would apply only to cars in intrastate commerce. The Court said:

“It is not necessary to specify in a State statute that it is limited to persons, property, or transactions within the State. But where the plain meaning of the statute is that it shall apply to these matters over which the State Legislature has jurisdiction, and equally to these matters over which the State Legislature has no jurisdiction, *and these subjects are so interrelated that it is reasonably apparent that the Legislature would not have attempted the regulation of one alone in the manner and to the extent specified in the statute, then the statute, being invalid in its main purpose, must be held wholly nugatory.*

* * * The provisions relative to local or State commerce covered by the same general words included in the same provisions and subject to the same duties do not, taking into consideration the words of the statute and *the subject matter of the regulation*, constitute a separate or severable portion of the statute which might survive.”

The Wisconsin statute made the right of the consignee to "free time" to unload and the right of the carrier to "demurrage" to depend upon the number of miles per day that the train moved which contained the car.

The Court said:

"State and interstate freight are carried in different cars of the same train, and sometimes in the same car."

It would be unreasonable to suppose that the Legislature would have enacted such a statute with reference to cars in intrastate commerce alone. The effect of such a statute, as pointed out by the Supreme Court of Wisconsin, would be to cause the carrier to expedite the cars containing intrastate shipments to the prejudice of cars containing interstate shipments.

Statutory provisions such as these cannot be without great difficulty applied to local traffic alone. The same cars are used for both interstate and local shipments; they are moved in the same trains; they often contain both interstate and local shipments. To provide for a higher rate of demurrage on cars containing local shipments than for cars containing interstate shipments would be to affect the movement of cars in interstate commerce.

As pointed out at pages 8 *et seq.* of the brief of

Defendant in Error and at pages 2 *et seq.* of the Supplemental Brief, the matter of a *prohibition against discrimination is a very different matter from a demurrage statute*. The people of California prohibited *discrimination* in charges within California and also on freight moving to or from other States. It is most apparent that the people desired to prevent discrimination *wherever they could*. It by no means follows because they were mistaken in assuming that they could prevent it in interstate commerce that they would not have declared it unlawful in California. *From the nature of the subject matter it is most apparent they would have declared it unlawful in California if they had known that they could not declare it unlawful in interstate commerce*.

Counsel's argument leads to the result that discrimination by a common carrier was lawful in California between 1879 and 1909, in which year the first statute declaring discrimination unlawful was enacted. During all these years it is said the constitutional prohibition against discrimination in charges within the State was inoperative because the people had also declared discriminatory charges unlawful on shipments going to or coming from other States.

The appellate courts of California have always assumed that the provision of Section 21 of Article XII of the Constitution as it existed prior to October 10, 1911, declaring discrimination unlawful, rendered

discrimination in rates unlawful in California.

Southern Pacific Company v. Superior Court,
27 Cal. App. 242, 247 (Rehearing denied by
Supreme Court).

Cowden v. Pacific Coast S. S. Co., 94 Cal.
470, 476.

There is much conflict in the authorities as to whether discrimination is unlawful in the absence of a statute declaring it illegal. The United States Supreme Court in *I. C. C. v. Baltimore & Ohio R. R. Co.*, 145 U. S. 275, said that the weight of authority was to the effect that it is unlawful at common law. The Supreme Court of California in *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, *supra*, held that discrimination was not contrary to the common law. This matter is referred to merely for the purpose of further illustrating the nature of a prohibition against discrimination and as showing how radically different it is from a demurrage statute.

In the *Trade-Mark Cases*, 100 U. S. 82, cited in the brief of Plaintiff in Error, the statute under consideration was an Act of Congress providing for the registration of trade marks and the punishment of persons counterfeiting trade marks so registered. The Supreme Court held that this act could not be upheld either as an act passed under the constitutional power of Congress to legislate on the subject of inventions and copyrights nor as an act passed under the commerce clause of the Constitution. The

act made no reference to interstate or foreign commerce, but was a general statute applying to trade marks wherever used. The Court said:

“It is therefore manifest that no such distinction is found in the act, but that its broad purpose was to establish a universal system of trade mark registration, for the benefit of all who had already used a trade mark or who intended to adopt one in the future without regard to the character of the trade to which it was to be applied.”

It was contended that the statute might be held valid as to trade marks used in interstate and foreign commerce. In replying to this contention the Court said:

“While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language which brings them within the constitutional power of that body.”

The Supreme Court cited the following language used by the Chief Justice in *U. S. v. Reese*, 92 U. S. 214:

“We are not able to reject a part which is constitutional and retain the remainder *because it is not possible to separate that which is constitutional, if there be any such, from that which*

is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, *but by inserting those that are not there now.*”

In *Baldwin v. Franks*, 120 U. S. 678, cited by Plaintiff in Error in its brief, the Court had under consideration the following provisions of the Revised Statutes:

“Section 5519. If two or more persons in any state or territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * each of said persons shall be punished,” etc.

The Supreme Court had held in *U. S. v. Harris* that this section was unconstitutional as a provision for the punishment of the conspiracies of the character therein mentioned, within a State.

In *Baldwin v. Franks*, *supra*, it was contended that in the *Harris* case the conspiracy charged was by persons in a State against a citizen of the United States and of the State to deprive him of the protection he was entitled to under the laws of that State, no special privileges arising under the Constitution, laws or treaties of the United States being involved, and that the section was good for the punishment of those who conspired to deprive aliens of the rights guaranteed to them by treaty. The Supreme Court said:

“In support of this argument reliance is had on the well settled rule that a statute may be in part constitutional and in part unconstitutional, and that under some circumstances the part which is constitutional will be enforced, and only that which is unconstitutional rejected. *To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—may be capable of separation, so that each may be read by itself.* This statute, considered as a statute punishing conspiracies, in a state, is not of that character, for in that connection *it has no parts within the meaning of the rule.* Whether it is separable, so that it can be enforced in a territory, though not in a state, is quite another question, and one we are not now called on to decide. It provides in general terms for the punishment of all who conspire for the purpose of depriving any person, or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough.”

It will be noted that in *Baldwin v. Franks, supra*, the contention was in effect a request that the Supreme Court enact by judicial construction an act which Congress did not pass.

In *Baldwin v. Franks, supra*, the Supreme Court further said (p. 689):

“The point to be determined in all such cases is whether the unconstitutional provisions *are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the Legislature.*”

Considering the provision of Section 21 of Article XII against discrimination, it clearly appears that if the prohibition against discrimination in interstate commerce is stricken out the intent of the Legislature and the people will be made effective, for the Legislature and the people quite evidently realized that discrimination was an evil which should be prevented. To hold that they did not prevent this evil in intrastate commerce because they erroneously assumed that they could also prevent it in interstate commerce would not effect the intention of the Legislature and of the people to prevent the evil but would frustrate that intention.

In *U. S. v. Reese*, 92 U. S. 214, cited by Plaintiff in Error, the Court had under consideration a penal statute providing for the punishment of all persons who by force, bribery, etc., hindered or delayed any person from qualifying to vote or voting. The only theory upon which the statute could be upheld was that it was legislation in pursuance of the 15th Amendment, which provides that no discrimination shall be practiced against any person on account of race, color or previous condition of servitude. The

question which the Supreme Court considered was “whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the franchise, on account of their race, etc.”

The Supreme Court said:

“There is no attempt in the sections now under consideration to prescribe specifically for such an offense. If the case is provided for at all it comes under the general prohibition against any wrongful act or unlawful obstruction. *We are therefore directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited to judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish.* For this purpose we must take the sections of the statute as they are. We are not able to reject a part which is constitutional, and retain the remainder, *because it is not possible to separate that which is constitutional, if there be any such, from that which is not.* The proposed effect is not to be attained by striking out or disregarding words that are in the section, *but by writing those that are not now there.*”

“The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.”

The rule that a State statute void in so far as it relates to interstate commerce may be enforced as to

local commerce is well illustrated by the *Case of State Freight Tax*, 82 U. S. 233 (15 Wall.) The decision in *Case of State Freight Tax* is described by the United States Supreme Court in *Supervisors v. Stanley*, 105 U. S. 306, as follows:

“*Case of the State Freight Tax* (15 Wall. 232) arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. *The act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company doing business within the State.* The railroad companies, who contested the tax, presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. *This Court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void.* It said: ‘It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. * * * The conclusion of the whole is that, in our opinion, the Act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried out of it, or articles taken up without the State and carried into it, is unconstitutional and void.’ The same language is repeated in *Eric Railway Co. v. Pennsylvania* (id. 282), decided at the same time. Both cases were remanded to the State court for further proceedings in conformity with the opinion, *which could only mean to enforce the tax on transportation limited to the State and not on interstate commerce.*”

“This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.”

A statute declaring discrimination in freight charges unlawful within the State and also declaring it unlawful in cases of shipments going to or coming from other States is not different in principle from the Pennsylvania statute imposing a tax on every ton of freight carried by every railroad in the State. If anything, the Pennsylvania statute as applied to local freight is less clearly valid than the statute against discrimination above referred to, for in the statute against discrimination the Legislature itself had separated the subjects, whereas in the case of the Pennsylvania statute the subjects of State and interstate commerce were embraced in the same terms.

In *Supervisors v. Stanley*, 105 U. S. 312, *supra*, the Supreme Court further said:

“The general proposition must be conceded, *that in a statute which contains invalid or unconstitutional provisions, that which is unaffected by these provisions, or which can stand without them, must remain. If the valid and invalid are capable of separation, only the latter are to be disregarded.*”

Referring to the *Trade Mark Cases*, 100 U. S. 82, cited by Plaintiff in Error, the Supreme Court said (p. 312):

“The Court in the two cases cited in the brief of *U. S. v. Reese*, 92 U. S. 214, and *Trade Mark Cases*, 100 U. S. 82, concedes the general principle that the whole of a statute is not necessarily void because a part of it may be so.”

In *Chamberlain v. Cranbury*, 57 N. J. Law 605, 614 (31 Atl. 1036), it was held that a statute conferring upon females the right to vote at any school meeting, although unconstitutional so far as it assumed to confer the right to vote for school trustees, is valid in respect to all other privileges granted, including the right to vote to raise money and to issue bonds. In this case the *Trade Marks Cases*, 100 U. S. 82, and a number of other decisions of the United States Supreme Court were considered. The Court said (p. 617):

“I think there is nothing to display on the part of the Legislature *an intention not to confer upon females all the powers which the act professes to confer, which are within the ability of the Legislature to confer*. I think it cannot be said that the Legislature would not have passed the act conferring power upon females to vote at all, because the power conferred to vote upon one matter is nugatory.”

In *Waters Pierce Oil Co. v. Texas*, 177 U. S. 28, 42, the Supreme Court considered a statute of Texas declaring that it should be unlawful for any foreign corporation violating certain provisions of the act to do any business in the State. It was contended that the statute was void as it did not except inter-

state business, and in support of this contention the *Trade Mark Cases* (100 U. S. 82) and other cases were cited. The Supreme Court said:

“They do not sustain the contention.”

In *Ratterman v. Western Union Telegraph Co.*, 127 U. S. 411, 423, the Supreme Court held valid an act of the Legislature of Ohio imposing a tax on the gross receipts of telegraph companies. The Telegraph Company contended that the act, being void as to receipts from its interstate business, was void *in toto* (p. 417). In overruling this contention the Supreme Court said:

“Neither are we of opinion that there is any real question, under the decisions of this Court, in regard to holding that, as far as this tax was levied upon receipts properly appurtenant to interstate commerce, it was void, *and that so far as it was only upon commerce wholly within the State it was valid. This precise question was decided in the case of The State Freight Tax*, 15 Wall. 232.”

It is apparent that it is more difficult to apply this statute to intrastate business than it would be to apply a statute against discrimination to intrastate business. Before the Ohio statute could be applied the receipts of the telegraph company from interstate and intrastate business had to be segregated. Every shipment of freight over a railroad is a sep-

arate transaction. An intrastate movement cannot be confused with an interstate movement.

In both *State Freight Tax Case*, 15 Wall. 232, *supra*, and *Ratterman v. Western Union*, 127 U. S. 411, 423, *supra*, it was conceded that the Legislature intended that the tax should be levied upon interstate commerce as well as on State commerce.

In *Weems v. United States*, 217 U. S. 349, 382, the Supreme Court said that a valid part of a statute should be separated from the part which was invalid “*unless their union was made imperative by the Legislature*” (citing *Employers’ Liability Cases*, 207 U. S. 463).

Judge Cooley in his work on *Constitutional Limitations* (7th Ed.) at page 246 states the rule as follows:

“Where, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are *connected in subject matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning, that it cannot be presumed that the Legislature would have passed the one without the other*. The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand and the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but *whether they are essentially and inseparably connected in substance*. If, when the unconstitutional part is

stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained."

Judge Cooley further states (p. 250) :

"If there are any exceptions to this rule, they must be of course where it is evident from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the Legislature will be defeated, if it shall be held valid as to some cases and void as to others."

In *Houston & Texas Cent. R. R. Co. v. Mayes*, 201 U. S. 321, the Supreme Court had under consideration a statute of Texas imposing a penalty upon common carriers who failed within a certain number of days after demand to provide cars for the shipment of stock. The statute in general terms applied to both interstate and intrastate shipments. The Supreme Court held that as applied to interstate commerce it was void.

In *Allen v. Texas & Pac. Ry. Co.*, 101 S. W. 792 (Tex.), decided subsequently to the decision of the United States Supreme Court, the Supreme Court of Texas held that as applied to intrastate commerce the statute was valid notwithstanding its invalidity as to interstate commerce. The Court said:

"Conceding that the statute was intended to apply to that subject (interstate transportation)

as well as to intrastate transportation, *it does not follow that it cannot operate upon the latter*. Whether or not it can have such restricted operation depends upon the well-known principles by which courts determine the effect of statutes partly, but not wholly, affected by constitutional infirmity. Assuming for the moment that the statute would have been valid if its operation had been expressly confined to transportation entirely within the State, the question is, whether or not it may be allowed to so operate, notwithstanding the attempt to make it embrace interstate transportation also, and the defeat of such attempt. The case, upon the assumption stated, is one of a statute applying to more than one subject, one of which it can and the other of which it cannot be made to govern.”

The Texas Court, after quoting from *Cooley's Constitutional Limitations*, pp. 215-216, said:

*“The main purpose the Legislature had in view in passing the statute was to enforce the duty of railroad companies promptly to furnish cars in which all property to be shipped over their lines might be started on its course, whether destined to points within or points without the State. * * * Believing that, when properly construed and applied, it may legitimately control the furnishing of cars for intrastate shipments, we are unwilling to say that the Legislature did not intend that it should operate so far, whether it could have the full effect intended or not.”*

The statute under consideration by the Texas Supreme Court appears in the margin of page 326 of Volume 201 of the United States Supreme Court Reports. The language employed by the Legislature

was general in its terms and applied to both intra-state and interstate shipments.

The Texas Supreme Court said that the *main purpose* of the Legislature was to enforce the duty of carriers to furnish cars promptly. So in the case of Section 21 of Article XII of the Constitution the main purpose of the people was to prevent discrimination, a manifest evil. There might have been some reason in the Texas case for holding that the Legislature did not intend that the particular statute then under consideration should apply to intrastate commerce only, but there can be no doubt whatever that the people would have declared discrimination unlawful in California if they knew that they could not declare it unlawful in interstate commerce.

See also :

Presser v. Illinois, 116 U. S. 252, 263.

State v. Peet, 68 Atl. 661, 666 (Vt.)

Skaneateles etc. Co. v. Village, 55 N. E. 562, 566 (N. Y.)

El Paso v. Gutierrez, 215 U. S. 87, 93.

International Textbook Co. v. Pigg, 217 U. S. 112, 113.

Oliver & Sons v. C., R. I. & P., 117 S. W. 238, 240 (Ark.)

Ex parte Agnew, 131 N. W. 817, 820 (Neb.)

S. P. Co. v. Railroad Commission, 78 Fed. 236, 257-8.

In the case last cited Mr. Justice McKenna, then Judge of the Circuit Court for the Northern District of California, held that the provision of Section 22

of Article XII of the Constitution that all rates established by the Commission should be deemed conclusively just and reasonable was unconstitutional, but that its unconstitutionality did not impair the other provisions of Section 22 creating the Commission and empowering it to establish rates.

We have been arguing upon the erroneous assumption that there is before the Court this question: Will it be presumed that the people of California would have declared discrimination unlawful in California if they had known that they could not declare it unlawful in interstate commerce? The answer to the question is obvious.

But in reality this question is not before the Court. As pointed out in the briefs on file, the long and short haul provision is a separate and distinct provision from the provision prohibiting discrimination. *The long and short haul provision is complete in itself.* It reads:

“Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing.”

As said by the Supreme Court of the United States in *Louisville & N. Ry. Co. v. Kentucky*, 183 U. S. 503, in construing the long and short haul clause of the Kentucky Constitution, “*the long and short haul distances mentioned are evidently distances upon the railroad within the State.*”

5. THAT THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION OF 1879 AND THE LONG AND SHORT HAUL CLAUSE OF THE CONSTITUTION AS AMENDED OCTOBER 10, 1911, DO NOT VIOLATE THE FEDERAL CONSTITUTION.

This subject was discussed at pages 20 *et seq.* of brief of Defendant in Error. No further argument in relation thereto was made in the Supplemental Brief of Defendant in Error for the reason that the subject was not referred to in Plaintiff in Error's Supplemental Brief.

The matter was not referred to at the re-argument.

6. A PERSON WHO IS REQUIRED TO PAY MORE THAN THE LEGAL CHARGE FOR TRANSPORTATION OF FREIGHT HAS A COMMON LAW RIGHT TO RECOVER THE OVERCHARGE, AND IN ADDITION TO SUCH COMMON LAW RIGHT HAS THE STATUTORY RIGHT CONFERRED BY THE STATUTES OF 1909, 1911, AND THE PUBLIC UTILITIES ACT. HEREIN OF THE CONTENTION THAT DEFENDANT IN ERROR'S ASSIGNORS WERE NOT "DAMAGED."

This matter was discussed at pages 40 *et seq.* of brief of Defendant in Error and also at pages 7 *et seq.* of Supplemental Brief of Defendant in Error.

The specific contention that the Defendant in Error was not "damaged" is replied to under this head at pages 66 to 83 of Defendant in Error's brief, and at pages 7 to 28 of the Supplemental Brief of Defendant in Error.

The contention that Defendant in Error was not "damaged" was again made at the re-argument. In support of this contention the cases of *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, and *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 200, were cited.

These cases were cited in the briefs of Plaintiff in Error in support of this contention.

The case of *Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, *supra*, not only fails to support counsel's contention, but is direct authority to the effect that the assignors of Defendant in Error are entitled to recover the difference between the higher charges

paid by them for the shorter distances and the lower rate charged by Plaintiff in Error for the longer haul.

The *Parsons* case was an action to recover damages for a violation of the long and short haul clause of the 4th Section of the Interstate Commerce Act before the amendment to that Section on June 18, 1910. The trial court sustained a demurrer to the complaint on the ground that the complaint did not show a violation of the long and short haul clause of the act, and this judgment was affirmed by the Circuit Court of Appeals. The judgment of the Circuit Court of Appeals was affirmed by the Supreme Court upon the ground that the complaint stated no violation of the long and short haul clause of the act. *The Supreme Court said, however, that if there had been a violation of the long and short haul clause the plaintiff would have been entitled to recover the difference between the rate which he had paid and the lesser rate for the greater distance.* The Court said:

“If he had shipped to New York and been charged local rates he might have recovered any excess thereon over through rates. He did not ship to New York and yet seeks to recover the extra sum he might have been charged if he had shipped.”

The plaintiff in the *Parsons* case shipped corn from Iowa points to Chicago. The complaint did not show that the rates from Nebraska points to Chicago were lower than the rates paid by plaintiff;

nor did it show that the rate charged plaintiff from Iowa points to Chicago was greater than the through rate charged from Nebraska points to New York and other places on the Atlantic seaboard. The Supreme Court said:

“There is nothing, therefore, to show that the local rate charged plaintiff from the Iowa place of shipment to Chicago was greater than the through rate charged from Nebraska to the four places on the seaboard, or greater than that charged for like shipments from his place of shipment to the same four places.”

The decision of the Supreme Court in the Parsons case conclusively shows that the Supreme Court deemed the measure of damages under the Interstate Commerce Act in case of a violation of the long and short haul clause to be the excess over the charge that would have been collected had there been no violation of the act.

The case of *Parsons v. C. & N. W. Ry. Co.*, 67 U. S. 447, *supra*, is referred to and the opinion therein quoted from at pages 21 to 26 of the Supplemental Brief of Defendant in Error.

Pennsylvania R. R. Co. v. International Coal Co., 230 U. S. 184, *supra*, was an action to recover damages for rebating. The Supreme Court held that the plaintiff was entitled to damages, but that the measure of damages was not necessarily the difference between the lawful rate paid by plaintiff and the unlawfully

low rate paid by the favored shipper. If the measure of damages contended for by plaintiff had been allowed the suit would have been in effect an action to recover a rebate similar to that unlawfully accorded the favored shipper. The Supreme Court said:

“Having paid only the lawful rate, the plaintiff was not overcharged, though the favored shipper was illegally undercharged.”

The Supreme Court further said:

“Making an illegal undercharge to one shipper did not license the carrier to make a similar undercharge to other shippers.”

The decision of the Supreme Court in *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184, *supra*, is referred to at length and the opinion quoted from at pages 69 to 75 of brief of Defendant in Error and at page 18 of Supplemental Brief of Defendant in Error.

The case of *Nix v. Southern Ry. Co.*, 31 I. C. C. 145, cited at the oral argument, was also cited by Plaintiff in Error in its briefs. It is referred to at page 17 of Supplemental Brief of Defendant in Error. It is uncertain whether the complainants actually paid charges maintained in violation of the 4th Section of the Act of Congress or whether they were complaining merely because other shippers at more distant points were accorded lower rates (p. 149). If the Interstate Commerce Commission in-

tended to hold that a shipper who paid for a shorter haul a rate in excess of that charged by the carrier for the longer haul was not damaged in the amount of the difference, its decision is directly opposed to those of every court where the question has arisen. The only authority cited by the Commission is *Penn. R. R. Co. v. International Coal Co.*, 230 U. S. 184. That, as we have seen, was a case where the plaintiff was charged the lawful rate and sought to measure his damages by the difference between such lawful rate and the unlawful rate accorded another shipper.

In every case where the question has come before the courts it has been held that for a violation of the long and short haul clause the plaintiff is entitled to recover the difference between the rate paid by him and the lower rate charged to the more distant point.

It was so held in each of the following cases where the matter was directly involved:

- Parsons v. C. & N. W. Ry. Co.*, 167 U. S. 447, *supra*.
- Louisville & N. Ry. Co. v. Walker*, 63 S. W. 20 (110 Ky. 961).
- Hutchinson v. R. R. Co.*, 57 S. W. 25 (Ky.)
- Junod v. C. & N. W. Ry. Co.*, 47 Fed. 290.
- Osborne v. C. & N. W. Ry. Co.*, 48 Fed. 49.
- Twells v. Penn. R. R. Co.*, 2 Walker 450 (3 Am. Law Reg. N. S. 728) (Penn. Supreme Court).

These cases are cited and the opinions therein

quoted from at pages 52 *et seq.* of brief of Defendant in Error.

In *Louisville & N. Ry. Co. v. Walker*, 110 Ky. 961 (63 S. W. 20), *supra*, the Supreme Court of Kentucky said:

*“As one means of protecting the local shipper, this section fixed a maximum limit, beyond which he should not be charged. It was thus made unlawful for the carrier to charge a greater compensation for the same service for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. When the charge for the longer haul is fixed, to charge more for the shorter haul is as clearly illegal as it would be to charge a greater sum than the law allowed where the law itself fixed a sum certain as the limit of the charge. * * * And, when appellant exacted of appellee more than it could legally charge, his right to recover the excess so paid is precisely similar to the right to recover for any other illegal exaction. He whose money is taken from him illegally is to that extent damaged. It is not necessary for appellee to show anything more than that he was compelled to pay more than appellant had a right to charge.”*

Topeka etc. Assn. v. St. Louis etc. Co., 13 I. C. C. 620, cited at the last argument, was decided in 1908, over two years before the amendment to Section 4 of the Interstate Commerce Act. At that time it was not unlawful to charge more for the shorter distance unless conditions were substantially similar and the statute was construed by the Supreme Court as leaving the primary determination of that question with

the carriers. Moreover, in the case cited the Commission said that the freight to the long haul point did not move through the intermediate point, but by an entirely different route. In the case at bar freight destined for Los Angeles over defendant's line moved through the points to which plaintiff's assignors shipped. The *Topeka* case was primarily a case involving the adjustment of rates. The 4th Section of the act was only incidentally involved. The Commission did not refer in any way to the measure of damages. Reparation was asked by the complainants, but as the Commission reached the conclusion that the act was not violated and that the rates should not be re-adjusted the complaint was dismissed without making any reference whatever to reparation.

The case of *Godwin v. Railway Co.*, 31 I. C. C. 25, did not involve a violation of the long and short haul clause of Section 4 of the act. That case involved charges upon through shipments which were in excess of the aggregate of the charges from the point of shipment to an intermediate point and the charges from such intermediate point to destination. Section 4 of the Act of Congress as amended on June 18, 1910, also declares that it is unlawful for a carrier "to charge any greater compensation as a through route than the aggregate of the intermediate rates." *But in the Godwin case the carrier, in pursuance of Section 4*

of the act, had filed an application for permission to charge a higher rate than the sum of the intermediate rates and this application was pending when the charges complained of were exacted. The Commission said :

“It is our conclusion that inasmuch as the situation was protected by an application for relief from the provisions of the fourth section, which had not been passed upon, and as the violation of the rule of that section has been removed, no reparation should be awarded.”

As the higher rate for the through haul was expressly continued in force by the amended Section 4 in all cases where applications were filed prior to six months after the passage of the act, it is clear that there was no violation of the fourth section of the act involved in the *Godwin* case.

The Commission went on, however, to ascertain whether or not the through rate was reasonable, that is, to ascertain if it violated the provision of the act that all rates should be reasonable. The complainant offered no evidence in support of the claim that it was unreasonable other than the evidence that it was in excess of the sum of the intermediate rates. The Commission held that this evidence raised a strong presumption that the through rate was unreasonable, but that this presumption was rebutted by the evidence offered by the defendants.

As in the *Godwin* case there was no violation of the

Act of Congress, it necessarily followed that the complainant was not damaged.

In *Stewart Greer Lumber Co. v. St. Louis etc. Co.*, 29 I. C. C. 120, also cited at the last oral argument, the charges exacted were not in violation of the fourth section of the act, *as the situation was protected by a fourth section application*. The application for relief was heard and denied at the same time that the complaint of the Stewart Greer Lumber Co. was heard. The Commission held that the rate paid by complainants was not unreasonable (p. 121). The rate charged did not violate the fourth section, nor the provisions of the act requiring all rates to be reasonable. Necessarily, therefore, the Commission did not award reparation. Referring to its denial of the fourth section application of the carrier, the Commission said:

“Our order under the fourth section will make unlawful for the future the maintenance of a higher rate by defendants from Mangham, Baskin and Winnsboro (the intermediate points) to New Orleans for export than is contemporaneously maintained by them from Rayville (the more distant point) to New Orleans.”

If after the denial of the fourth section application the carrier had continued to charge a higher rate from the intermediate points, can it be doubted that the Commission would have awarded reparation based on the difference between the rates?

At the last oral argument counsel for Plaintiff in

Error said: "In the case at bar practically all of the complainants are mercantile firms who have absorbed whatever difference there is in the cost of their wares and goods, and will naturally absorb whatever judgment they may get in this case"; and in support of this statement cited the opinion of the Railroad Commission of California in the case of *Phoenix Milling Co. v. S. P. Co.*, 7 C. R. C. 677. In that case the Commission refused to award reparation to a shipper who had paid more for the shorter distance upon the ground that:

"It was fair to assume complainant based his selling price upon cost and carriage and made his profit, in which event, reparation, if due to anyone, is due to the people to whom complainant sold his wares."

The theory upon which reparation was denied by the Railroad Commission has been so completely refuted by the courts and by the Interstate Commerce Commission that it is indeed remarkable that the Railroad Commission of California should persist in countenancing it.

The theory that a shipper of freight who sells the goods upon which he paid the unlawful charges is not entitled to recover the overcharge because he may have partly "reimbursed" himself upon a sale is directly opposed to the very first principles of the law. It would cast upon the courts or the Commission

the impossible task of determining whether as to each and every shipment made the shipper was in a position in some manner to recoup himself for the unlawfully high rate which he was required to pay.

The contention which has been acquiesced in by the Railroad Commission of California was made before the Interstate Commerce Commission in *Burgess v. Transcontinental Freight Bureau*, 13 I. C. C. 668, 679 (cited and quoted from at page 78 of brief of Defendant in Error). In that case the carrier contended that the complainant was not damaged "because the advance in the freight rate had been added to the price paid by the customer." In overruling this contention the Interstate Commerce Commission said:

"It is impossible to say, therefore, to what extent these complainants may have been actually damaged by the advance in this rate, if the word 'damage' is to be interpreted and applied as claimed by the defendants.

"Such is not, in our opinion, the proper meaning of this term. These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was, in fact, exacted. They were thereby deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid,

it would never be possible to show damages with sufficient accuracy to justify giving them. Certainly these defendants are not entitled to this money which they have taken from the complainants, and they ought not to be heard to say that they should not be required to refund this amount because the complainants themselves may have obtained some portion of this sum from the consumer of the commodity.’’

In *Kindelon v. S. P. Co.*, 17 I. C. C. 251, 255, the Interstate Commerce Commission said:

“The defendants further contend that the complainants herein have not shown that they were damaged. It is well settled that reparation in any given case is due the person who has been required to pay an unlawful charge as the price of transportation. The shipper who has been charged an unlawful rate and who is the owner of the goods transported is entitled to repayment without the imposition of the impossible task upon the Commission of ascertaining the ultimate profits accruing from the business of the shipper. Moreover, the owner of the freight who has been required to pay an unreasonable rate is entitled, upon proper complaint and showing, to reparation irrespective of the profits accruing from his business.”

In *Michigan Hardwood Mfrs. Assn. v. Freight Bureau*, 27 I. C. C. 32, 39 (decided May 6, 1913), the Interstate Commerce Commission said:

*“The defendants urge that, inasmuch as the complainants increased the price of their lumber by the amount of the increase in the transportation charge, they have suffered no damage. * * **

** * ** The profit which a lumber manufacturer makes depends not only upon his profit

per 1,000 feet, but also upon the number of thousand feet which he sells. The hardwood lumber which is consumed upon the Pacific Coast is brought in from foreign countries as well as from the East. An advance of \$4 per 1,000 feet would certainly tend to limit the sales of the Eastern producer as compared with his foreign competitor. *Assuming, therefore, that an advance equal to the increase in the freight rate was charged, the number of sales might have declined so that the total profit to the shipper was very much less than it otherwise would have been. Evidently the complainants' damages could not be assessed upon any such speculative basis.* * * * We find that these complainants have been compelled to pay a rate of 85 cents and that the complainants have been damaged by that amount which the defendants have unlawfully exacted from them."

The latest case before the Interstate Commerce Commission where this contention was made and replied to is *Ballou v. N. Y., N. H. & H. Co.*, 34 I. C. C. 120 (decided April 15, 1915). In that case Ballou & Co., wholesale dealers in motorcycles at Portland, Oregon, had motorcycles shipped to them from Armory, Massachusetts. The complainant asked the Commission to reduce the rate, which was alleged to be unreasonably high. The Commission found the rate unreasonable, reduced it, and awarded reparation. In awarding reparation the Commission said:

"The single question contested is complainant's right to reparation, defendant showing *that complainant added an arbitrary sum of \$15 to the sale price of each motorcycle to cover*

freight and local drayage charges, from which they argue that complainant suffered no damage and therefore is not entitled to reparation. This question is concluded by Burgess v. Transcontinental Freight Bureau, 13 I. C. C. 668, affirmed in Michigan Hardwood Mfrs. Assn. v. Freight Bureau, 27 I. C. C. 32, in which we said:

‘These complainants were shippers of hardwood lumber to this destination and they were entitled to a reasonable rate from the defendants for the service of transportation. An unreasonable rate was, in fact, exacted. They were therefore deprived of a legal right and the measure of their damage is the difference between the rate to which they were entitled and the rate which they were compelled to pay. If complainants were obliged to follow every transaction to its ultimate result and to trace out the exact commercial effect of the freight rate paid, it would never be possible to show damages with sufficient accuracy to justify giving them.’

“Carriers cannot be heard to say that reparation for the exaction of unreasonable freight charges should be denied because the shipper or consignee from whom the same has been collected has on that account secured a higher price for the commodity from the purchaser.”

The Supreme Court of the United States in the case of *Union Pacific v. Goodridge*, 149 U. S. 680, expressly held that in an action to recover damages for charging unlawful rates on coal the *question of the profits which the plaintiff made upon a sale of the property transported was too remote to be made an element of damages*. This was an action brought to recover excessive freight charges under a Colo-

rado statute. The Colorado statute, unlike the Interstate Commerce Act, expressly provided that the lawful rate should be the lowest rate charged to any shipper. Under this statute it was not unlawful to give rebates, but if they were allowed the resulting lower rate became the lawful rate. Judgment was rendered in favor of the plaintiffs and in the Supreme Court the defendant contended that "there was no sufficient evidence to support the verdict and especially as to the amount of damage." *The defendant contended that it was incumbent upon the plaintiffs to show that in selling the coal to their customers they had not been reimbursed in whole or in part for the excessive charges.* In overruling this contention the Supreme Court said:

"The damages sustained by plaintiffs were measured by the amount of such rebate which should have been allowed to them. *The question whether they lost profits upon the sale of this coal by reason of the non-allowance of such rebates was too remote to be made an element of damages.*"

The case of *Ballou v. N. Y., N. H. & H. Co.*, 34 I. C. C. 120, *supra*, is not cited in the briefs of Defendant in Error.

Phoenix Milling Co. v. S. P. Co., 7 C. R. C. 677, cited by Plaintiff in Error, is not the only case where the Railroad Commission of California erred in this respect. In *Steiger Terra Cotta & Pottery Works v.*

S. P. Co., 7 C. R. C. 288, decided about the same time as the *Phoenix Milling Company* case, the Commission held that a shipper who paid an unreasonably high, and therefore unlawful, rate, on raw clay, was not entitled to reparation unless he could show that he was not "reimbursed" upon a sale of the goods transported, or in this particular case upon a sale of the finished product manufactured from the raw clay. In the case last mentioned the complainant paid an unreasonably high rate upon shipments of raw clay to its factory. The raw clay was not sold by the complainant, but products manufactured therefrom were sold. The complainant attempted to satisfy the rule of the Railroad Commission that it should show that it was not "reimbursed" upon a sale of its manufactured product for the excessive charges exacted. The president of the complainant corporation testified that it was operating at a loss.

In holding that the complainant was not entitled to reparation the Railroad Commission said:

"Steiger Terra Cotta and Pottery Works, through its president, testified that it was operating at a loss; that the prices at which, through competition, it was compelled to sell its products did not return sufficient to cover the cost of manufacturing the goods and managing the business. But it is significant that factories engaged in the same business as this complainant are operating in the same locality at a profit. It may well be, therefore, that the loss suffered by this complainant is not due to the collection by the carriers of

an unreasonable rate for the transportation of clay. The loss on complainant's business may be due to the more advantageous location of competing plants, or to the ability of such competitors to manufacture or market their wares more cheaply than complainant, because of more favorable labor conditions, or because of more favorable rates on the manufactured products from the plant to the markets where the products are sold. *While complainant is operating its business at a loss, there is nothing in the record to show that the complainant has not been reimbursed at least for the unreasonable rate collected on the clay shipped to its factory."*

The utter absurdity of the rule of the Railroad Commission of California that a shipper who paid an unlawful rate is not entitled to recover the excess over the lawful rate unless he can also show that he did not "base his selling price on cost plus carriage" is shown by the opinion of the Commission last referred to. In that case there was imposed upon a manufacturer the impossible task of proving that he was not "reimbursed" by customers who purchased the manufactured product. To attempt to do so, he would have to keep a record of each particular article manufactured from the shipment upon which he paid the unlawful rate and trace in every sale of such article the exact cost; to this cost he would add the "carriage," including the excessive freight rate, and to the sum he would add that most indefinite and uncertain sum which he would call his "profit." If the sum of these should exceed the sum of the purchase

price received on a sale of every article manufactured from that carload of clay such excess might be his "damage."

The Railroad Commission of California is the only tribunal, judicial or quasi-judicial, which has ever countenanced such a theory. Wherever else it has been suggested it has been refuted.

At the last oral argument counsel for Plaintiff in Error with reference to the decisions of the Railroad Commission made the following statement:

"When they act in a manner touched by their judicial functions, their decisions, I take it, are entitled to the same amount of weight as any corresponding court of California."

The exigencies of this case have impelled Plaintiff in Error to advance many novel propositions of law, but none more novel or startling than this. The Supreme Court of California and the District Courts of Appeal are ordained by the Constitution for the purpose of authoritatively construing the laws of California. The power to construe the laws was not vested in the Railroad Commission. Necessarily any body exercising judicial functions is required to construe the law for the purpose of the inquiry then being conducted; but its construction of the law is not authoritative. The power of the Railroad Commission is not different in this respect than the power of a Board of Supervisors when it takes the various

steps required by statute for the purpose of organizing an irrigation district. All the Supreme Court of California held in the *Telephone* case (166 Cal. 640, 650) was that "the powers and functions of the Railroad Commission in many instances, and in the present one, are of a highly judicial nature." The power under consideration by the Supreme Court related to compelling physical connection between competing telephone companies. The question as to whether or not the powers exercised by the Commission were judicial was necessarily before the Court because the application in the *Telephone* case was for a writ of *certiorari*, which will be issued only to a body exercising judicial functions. In holding that the powers were of a judicial nature and that the writ should issue, the Supreme Court cited as authority the case of *Imperial Water Co. v. Board of Supervisors*, 162 Cal. 114, wherein the Court had held that a Board of Supervisors in taking the steps required by statute for the organization of an irrigation district exercises judicial functions.

As pointed out at page 72 of brief of Defendant in Error, and at page 20 of the Supplemental Brief, the provision of the Constitution as it existed prior to October 10, 1911, is *for the express benefit of the shipper to the intermediate point*. In plain and unambiguous language it conferred upon him the right to have his property transported to the less distant

point at charges not exceeding the rate maintained for the greater distance. It read:

“Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing.”

Not only was it declared unlawful to charge a higher rate to the more distant point, but it was *expressly provided* that the rate to the more distant point should be the maximum rate which could be charged to the less distant point. On October 10, 1911, the form of the prohibition was changed and a relief clause added. It is clear that there is nothing in this change which abrogated the right (which existed prior to October 10, 1911) of a shipper to have his property transported at charges not exceeding the rate charged to the more distant point.

It does not make a particle of difference, however, whether the long and short haul provision is expressed in the terms employed in the Constitution of California prior to the amendment of October 10, 1911, or in the terms employed in the 4th Section of the Interstate Commerce Act and in Section 21 of Article XII as amended October 10, 1911. The effect of the provisions is the same—the form only is different.

If a statute provided that the rate for a certain service should be ten dollars, a person required to pay more than ten dollars would have a cause of action to recover the excess and such excess would necessarily be the measure of his damages. On the other hand, if the statute in terms provided that it was unlawful to charge more than ten dollars, the measure of damages of a person required to pay more would be the same.

7. THAT IT IS WHOLLY IMMATERIAL WHETHER FORMAL PROTEST WAS MADE AT THE TIME OF THE PAYMENT OF THE ILLEGAL CHARGES.

The matter above referred to was discussed at pages 84 *et seq.* of brief of Defendant in Error. The matter was not referred to in the Supplemental Brief of Defendant in Error for the reason that it was not discussed in Plaintiff in Error's Supplemental Brief. The matter was not referred to at the last oral argument.

8. THE RAILROAD COMMISSION HAS NO POWER TO ESTABLISH RATES CONTRAVENING THE CONSTITUTIONAL PROVISION, AND IF IT ASSUMED TO DO SO ITS ACT WAS VOID.

This matter was discussed at pages 124 *et seq.* of brief of Defendant in Error and at page 56 of Supplemental Brief of Defendant in Error. It was not referred to at the last oral argument.

9. THAT IT WAS NOT INCUMBENT UPON THE PLAINTIFF BELOW TO PROVE THAT THE COMMISSION HAD NOT RELIEVED PLAINTIFF IN ERROR FROM THE PROHIBITION OF THE CONSTITUTION, BECAUSE IF SUCH RELIEF HAD BEEN GRANTED, IT WAS A MATTER OF DEFENSE WHICH THE LAW REQUIRED THE DEFENDANT TO PLEAD AND PROVE.

This matter was referred to at page 155 of brief of Defendant in Error. It was not referred to in the Supplemental Briefs of Plaintiff in Error or Defendant in Error, nor was it referred to at the final oral argument.

10. NO REPARATION ORDER OF THE RAILROAD COMMISSION WAS NECESSARY IN ORDER TO ENTITLE THE PLAINTIFF, OR ITS ASSIGNORS, TO MAINTAIN AN ACTION IN THE COURTS.

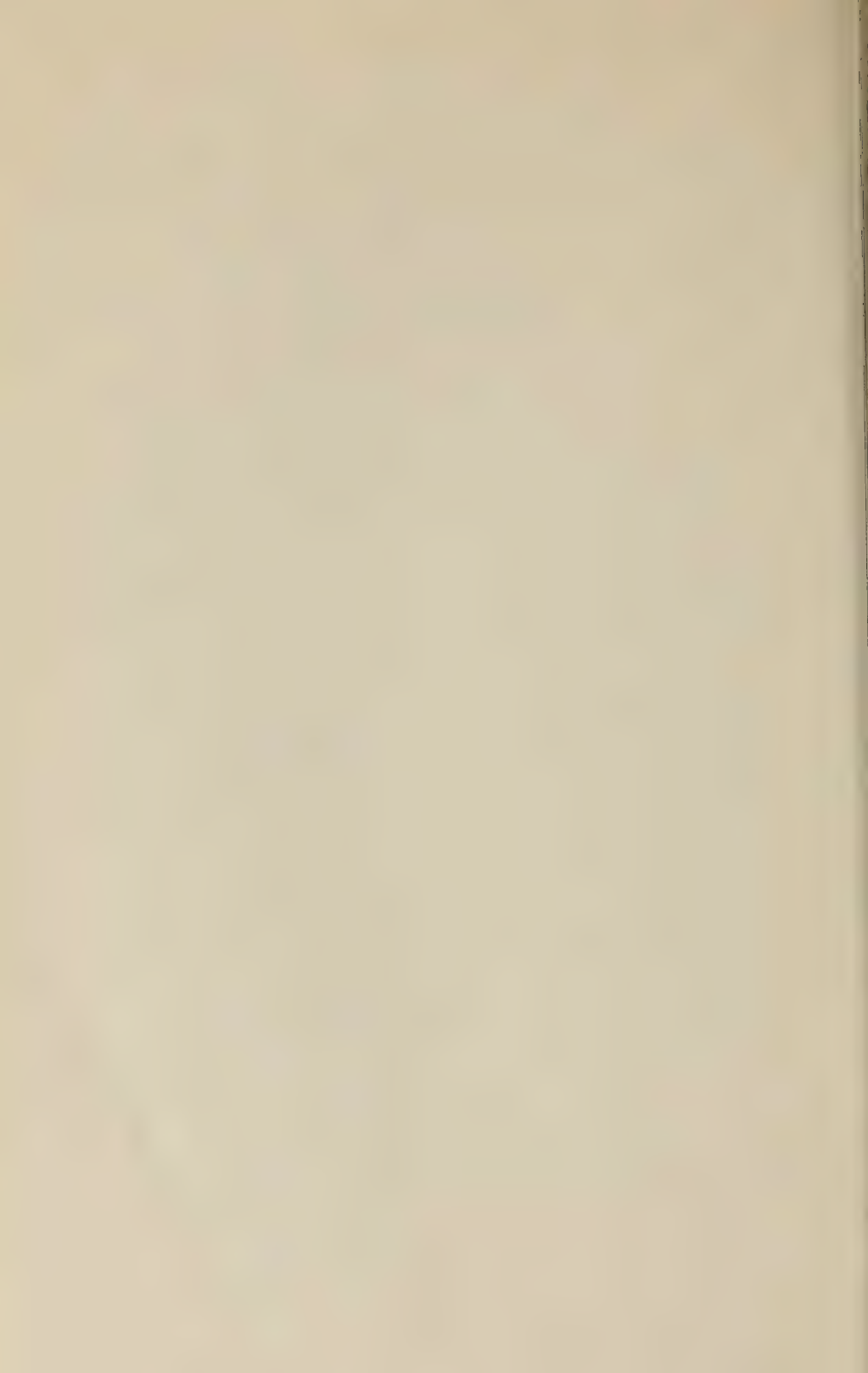
This matter was discussed at pages 158 *et seq.* of brief of Defendant in Error and at pages 87 *et seq.* of Supplemental Brief of Defendant in Error. It was not referred to at the last oral argument.

CONCLUSION

It is respectfully submitted that the judgment of the District Court should be affirmed.

**HOEFLER, COOK, HARWOOD & MORRIS,
ALFRED J. HARWOOD,**

Attorneys for Defendant in Error.



In the United States
Circuit Court of Appeals
For the Ninth Circuit

HON. WILLIAM B. GILBERT, Circuit Judge,
HON. ERSKINE M. ROSS, Circuit Judge,
HON. WILLIAM H. HUNT, Circuit Judge.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

VS.

THE CALIFORNIA ADJUSTMENT COMPANY,
a Corporation,
Defendant in Error.

SECOND ORAL ARGUMENT FOR PLAINTIFF IN ERROR
SUPPLEMENTAL BRIEF

COPY OF DECISION CALIFORNIA RAILROAD COMMISSION IN
PHOENIX MILLING CO. V. SOUTHERN PACIFIC CO.

IN ERROR TO THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SECOND
DIVISION.

HENLEY C. BOOTH,
GEORGE D. SQUIRES,
FRANK B. AUSTIN,
Attorneys for Plaintiff in Error.

Filed

JUN 26 1916

F. D. Monckton,
Clerk.

NO. 2643.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

HON. WILLIAM B. GILBERT, Circuit Judge,
HON. ERSKINE M. ROSS, Circuit Judge,
HON. WILLIAM H. HUNT, Circuit Judge.

SOUTHERN PACIFIC COMPANY, a Corporation,
Plaintiff in Error,

vs.

THE CALIFORNIA ADJUSTMENT COMPANY,
a Corporation,
Defendant in Error.

SECOND ORAL ARGUMENT
WEDNESDAY, MAY 24, 1916.

COUNSEL APPEARING

For Plaintiff in Error: HENRY C. BOOTH, Esq., GEORGE D.
SQUIRES, Esq., and FRANK B. AUSTIN, Esq.

For Defendant in Error: HOEFLER, COOK, HARWOOD and
MORRIS.

ARGUMENT OF HENLEY C. BOOTH, ESQ.

(Note: Some quotations are inserted herein which were not read to the court on oral argument.)

MR. BOOTH: May it please the Court, this case was argued last December, and the Court has made an order that the matter be re-argued and re-submitted. His Honor, Judge Gilbert, was kind enough to tell Mr. Harwood and me when we called upon him the other day that the Court did not care for any argument on the first class of cases involved in this proceeding; that is to say, those cases in which the violation of the long and short haul clause of the California Constitution was alleged to have occurred before October 10, 1911.

JUDGE GILBERT: It has occurred to me since that Judge Hunt did not sit in that case, and that you had better submit the whole case; you may submit it on briefs.

MR. BOOTH: As to the first class of cases I am willing to submit the case on the briefs on file, with the exception of some of the authorities which have been published since, which I desire to cite to the Court, and to have added to the briefs.

JUDGE GILBERT: Very well.

MR. BOOTH: The case divides itself distinctly into two classes of cases. The first class is susceptible of no subdivision. The second class of cases is susceptible of more or less subdivision. Both of the

classes of cases arise under the long and short haul clause of the California Constitution. The first class of cases arises under that clause as it was adopted in 1879, and as it remained unchanged until October 10, 1911. The second class of cases arises under the same section of the California Constitution as it was amended on October 10, 1911.

I fear that the length of the record in this case, and the perhaps necessary length of the briefs has somewhat obscured the points upon which I desire to make whatever re-argument that might be proper at this time. As to the first class of cases——

JUDGE HUNT. (Intg.): What's the case? Tell me in a few words what the question is.

MR. BOOTH: The case comprises a number of causes of action assigned to the defendant in error, the California Adjustment Company, claimng that its assignors had been charged more for the lesser than for the greater distance on the same line, and in the same direction for rail transportaiton in California. That, in brief, is the case. It is somewhat analogous, to cases coming under the fourth section of the Interstate Commerce Act, prohibiting charging more for the lesser than for the greater distance.

JUDGE HUNT: What is the difference between the provisions of the Constitution of this State and the Interstate Commerce Act?

MR. BOOTH: The difference between the I. C. Act and the California clause, as it was amended on October 10, 1911, is not so great. But as the clause stood from 1879 to October 10, 1911, it was provided in Article 12, Section 21 of the California Constitution,—

JUDGE HUNT: I will find that in your brief, will I not?

MR. BOOTH: It is on page 4 of the brief of the plaintiff in error. The amendment to the California Constitution, adopted October 10, 1911, is on page 6 of the brief of the plaintiff in error.

The essential difference, however, between the amendment to the California Constitution and the fourth section of the Interstate Commerce Act is that in the amendment to the California Constitution there is no six months suspension, as there is in the Interstate Commerce Commission Act, section four.

We argued as to the first class of cases, those which arise under the Constitution of 1879, that first, the Constitution was invalid because in terms it attempted to regulate interstate commerce. We argued, second, that even if it were not invalid on that ground, it was invalid because it contains no relieving clause; in other words, that it was an inflexible measure established by the Constitution which gave the carriers no option, which gave the Railroad Commission no option, and which did not regard the dis-

similarities of conditions as between the haul to the more distant point and the haul to the less distant point. I think those points are quite fully covered in the briefs of counsel for both sides; and not anticipating that His Honor, Judge Hunt, would be here and desire light on the first branch of the case, I did not prepare myself to make any re-argument on the first class of cases, except that I do desire to cite to your Honors a quite recent decision of the Supreme Court of Wisconsin. It is the case of *Chicago, Milwaukee & St. Paul Railway Company v. Rock County Sugar Company*, 156 Northwestern, at page 607, decided February 22, 1916. It is in the advance sheets of March 24, 1916. In that case the legislature of the state of Wisconsin had passed a statute in which it is attempted to regulate the movement of cars and the unloading of cars, in short, a demurrage statute. The statute did not in terms, as does, as we claim, the original section of the California Constitution, attempt to regulate interstate commerce. It merely said that the provisions of the statute should apply to carload freight from point of shipment to point of destination.

I will not take the time of the Court to read the opinion, because it is quite lengthy, but, from our standpoint, at least, it is quite an able analysis of a statute or constitutional provision which attempts to blend the regulation of interstate com-

merce with that regulation which the legislature of the state has the power to enact. The Court says:

“Where the plain meaning of the statute is “that it shall apply to those matters over which the “state Legislature has jurisdiction, and these subjects are so interrelated that it is reasonably apparent that the Legislature would not have attempted “the regulation of one alone in the manner and to “the extent specified in the statute, then the statute, “being invalid in its main purpose, must be held “wholly nugatory.” And it cites a number of United States Supreme Court decisions and a number of state decisions.

There is one sentence here that is so pertinent in this regard, that I cannot help calling the Court’s specific attention to it. The Court said: “Here, if “we find the statute in conflict with a paramount “rule of law, we vindicate and uphold the latter by “refusing to uphold the former, and this necessary “result is sometimes loosely spoken of as ‘declaring “‘the statute unconstitutional.’ The Federal government is the paramount authority in the regulation “of interstate commerce.” Then they refer to the familiar line of decisions holding that the Federal government has reached out its hands to include all services in connection with the delivery and handling of property transported interstate.

So much, if your Honor please, on the first branch of the case. As to the specific case, as I say,

I am quite willing to submit the case of the plaintiff in error on our brief. Indeed, I can hardly do anything else in the limited time I have.

There is, however, one point which pervades this case, both as to the first class of cases and as to the second class of cases, and that is the question as to whether it is essential for the Plaintiff in ~~Error~~ in the court below to have alleged and proved damage to its assignors. I think that that question is as well treated in our briefs as I wish to do, and therefore I desire to add little more on that subject than to remind the court that that question applies to both classes of cases irrespective of any other subdivision, and that it is entirely apparent from the record that there was no effort made either to allege or to prove that the plaintiff, or the assignors of the plaintiff had been damaged.

I merely desire on this point to submit for the consideration of the court some additional authorities which have come to my attention since the argument here in December. The plaintiff has been proceeding in this action on the theory that proof of violation of the long and short haul clause establishes damage in favor of a shipper, and establishes the amount of such damages in a sum equal to the difference between the higher rate which was paid to an intermediate point and the lower rate contemporaneously in effect to more distant points.

In *Parsons vs. Chicago & Northwestern*, 167 U. S. 447, the Court, referring to the Interstate Commerce Act, said "Before any party can recover under the Act he must show, not merely the wrong of the carrier, but that that wrong has in fact operated to his injury."

In *Pennsylvania Ry. vs. International Coal Co.*, 230 U. S. 200, the Court said:

"Congress had not then and has not since given any indication of an intent that persons not injured might nevertheless recover what so-called damages would really be, a penalty in addition to the penalty payable to the government. Proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary fact as would be required to sustain a recovery before a court of law. Mere proof of specified shipments made and the freight paid and the amount for which reparation is sought does not make out a *prima facie* case. Something more is necessary. The plaintiff must show how the discrimination found to exist affected him to his damage. In other words he must establish the fact of his damage, as well as the amount of damage he claims."

And again in the *Parsons Case*, which has just been referred to:

“We remark again that there is no averment in this petition that the rates charged to and paid by the plaintiff were, in themselves, unreasonable; that is, it is not claimed that the rates for shipping corn from points in Iowa to Chicago were not fair and reasonable charges for the services rendered. The burden of the complaint is the partiality and favoritism shown to places and shippers in Nebraska. The plaintiff is not seeking to recover money which inequitably and without full value given has been taken from him. He is only seeking to recover money which he alleges is due, not because of any unreasonable charge, but on account of the wrongful conduct of the defendant.

Again, his cause of action is based entirely on a statute, and to enforce what in its nature is a penalty. Suppose that the officials of the defendant company had charged the plaintiff only a reasonable rate for his personal transportation from his home in Iowa to Chicago, and at the same time had, without any just occasion therefor, given to his neighbor across the street free transportation, thus being guilty of an act of favoritism and partiality—an act which tended to diminish the receipts of the railroad company, and to that extent the dividends to its stockholders—such partiality on their part would not, in the absence of a statute, have en-

titled the plaintiff to maintain an action for the recovery of the fare which he had paid, and thus to reduct still further the dividends to the stockholders. So, but for the provisions of the Interstate Commerce Act, the plaintiff could not recover on account of his shipments to Chicago, if only a reasonable rate was charged therefor, no matter though it appeared that of the railway officials shippers in Nebraska had been given a lesser rate.

It was, among other reasons, in order to avoid the public injury which had sprung from such conduct on the part of railway officials that the Interstate Commerce Act was passed, and violations of its provisions were subjected to penalties of one kind or another. But it is familiar law that one who is seeking to recover a penalty is bound by the rule of strict proof. Before, therefore, the plaintiff can recover of this defendant for alleged violations of the Interstate Commerce Act he must make a case showing not by way of inference but clearly and directly such violations. No violation of statute is to be presumed."

That a mere violation of the long and short haul clause without anything more does not establish a claim for damages has uniformly been held by the Interstate Commerce Commission. Thus, in the

case of Topeka, etc., v. St. Louis, etc., 13 ICC 620, at page 627, referring to the various claims of the plaintiff, the Commission said:

“Third. That section 4 of the Act is violated in that a lesser rate is charged to Burlington, Iowa, than to Kansas City, an intermediate point, over a through route.

The complaint here is that bananas move from New Orleans through Kansas City to Burlington, Iowa and that the Kansas City rate is higher than the Burlington. There is a joint rate quoted in the tariffs to Burlington via Kansas City, but no bananas seem ever to have moved over that route. It is nothing more than a paper rate, bananas destined for Burlington moving through St. Louis.”

The complaint was dismissed.

In the case of Nix & Co. vs. Southern Ry., 31 ICC 145, which involved a violation of the long and short haul clause of the Interstate Commerce Act, as amended in 1910, it appeared that the carriers had not protected themselves by any application to the Commission for leave to deviate from the long and short haul clause. The Commission, page 149, says:

“The interstate carriers had made no application to the Commission for authority to publish rates in contravention of the long and short haul rule, and stated that it was through over-

sight that they were so adjusted. As the Fourth Section provides that it shall be unlawful for a carrier to charge more for the shorter than for the longer haul over the same line, complainants seek reparation on shipments to New York on the basis of the lower rate contemporaneously in effect from and to the more distant point. While the records show that complainants shipped to Boston by the Norfolk & Western in 1911, and via the Chesapeake & Ohio in 1910, it does not appear that the shipments were made from Lynchburg to New York, or from points on the Chesapeake & Ohio and points on the Southern Railway to Boston during the time that the higher rates from and to the intermediate points were in effect. There is no proof, therefore, that complainants have been in anywise damaged by the maintenance of the lower rates from and to the more distant points. The mere fact that the rates charged were maintained in violation of the Fourth Section of the Act, while it may make the carriers subject to a prosecution under the Act for the recovery by the Government of a penalty prescribed for violation thereof, does not in the absence of proof of damage to the shipper afford a basis for an award of reparation in his favor."

Again in the case of Goodwin vs. Ry. Co. 21 ICC. 25, there was an instance where the through rate exceeded the sum of the local rates in violation of another part of section 4 of the interstate act, and the Commission said:

“Where the complainant makes no charge that the joint rate is unreasonable, but merely claims reparation upon the theory that the shipments were or could have been recognized, as it is claimed in this case they were, the Commission will not award reparation.”

In the case of Kellogg, etc., vs. Michigan Central, 24 ICC. 604, the Commission held that there was no warrant for the violation of the Fourth Section, but at the same time said they did not regard the case as one for reparation, and none would be awarded. In saying that the case was not one for reparation, they did not mean that no reparation was sought in the complaint, because on page 604, it is distinctly stated that reparation was asked.

In the case of Stewart vs. St. Louis, 29 ICC. 120, there was a violation of the long and short haul clause, and reparation was asked. The Commission said:

“There is no such definite proof of record respecting the damage, if any, suffered by the complainants on account of the lower rate from Rayville as to warrant an award of reparation.”

The Commission of this state in *Phoenix Milling Co. vs. SP.*, Vol. VII of the *Opinions of the Commission*, at page 677, hereinafter referred to, had before it a case where the Southern Pacific had been charging 16c per hundred pounds from San Francisco to Sacramento, and only 13c from San Francisco to Perkins, a point beyond Sacramento. Comr.. Loveland said in the opinion at page 683:

“I have no hesitation in declaring my conviction that reparation should be awarded where complainants can show that the application of rates violative of the long and short haul rule has resulted in damage to complainants. I do not believe that the carriers should be required to pay reparation to a complainant who has not been damaged, when it is evident that such reparation cannot be passed on to those who are entitled to it, but rather that complainant will itvas additional profit.”

Before again referring to that decision I desire to refer your honors to the opinion of the Supreme Court of California in *Pacific Telephone Company vs. Eshleman*, 166 Cal. 640, where the powers of this Commission are considered and defined by the Supreme Court of the State of California. I take it that the decision within certain well understood limits will be regarded as controlling in the determination of this case. I am reading from page

860. The opinion is by Justice Henshaw and concurred in practically by the whole court.

“As the Public Utilities Act is here for the first time before this court, as the question is thus fairly within this case, and as to ignore it is but to necessitate its consideration in subsequent litigation, it is proper to say that we held the powers and functions of the railroad commissioners in many instances, and in the present one, to be of a highly judicial nature.” (That was where they had compelled connections between telephone companies.) That judicial powers were with deliberation vested in the commission the language of the constitution and of the legislative enactments following the constitution leave no doubt.”

Then they go on to consider the powers which were vested in the commission. I want to come back to this case in a moment and refer to it in connection with another matter, but it seems clear that in the light of this decision the railroad commission of California is vested with a combination, so to speak, of administrative and judicial powers; that when they act in a matter touched by their judicial functions their decisions, I take it, are entitled to the same amount of weight as any corresponding court of California, and I think, your honors, when you come to examine the case, if you

have not already examined it, you will conclude that the powers of the commission are almost equal, at least, to those of the Supreme Court of this State.

In the case of Phoenix Milling Company vs. Southern Pacific, reported in Volume VII of the Commission's opinions, at page 677, of the bound volume of California Railroad Commission decisions, decided July 23, 1915 (copy printed at end hereof for convenient reference), the Commission found that there was a discriminatory rate in effect and a rate violative of the long and short haul clause of the constitution as amended, yet the Commissioner writing the opinion says:

“I have no hesitation in declaring my conviction that reparation should be awarded where complainant can show that the application of rates violative of the long and short haul rule has resulted in damage to the complainant. I do not believe that the carriers should be required to make reparation to a complainant who has not been damaged, when it is evident that such reparation cannot be passed on to those who are entitled to it, but rather that complainant will keep it as additional proof.

In the case at bar practically all the complainants are mercantile firms who have passed on whatever difference there is in the cost of their wares

and goods, and will naturally absorb whatever judgment they may get in this case. Then the Commissioner goes on further to say:

“There may be instances where complainants will be able to show that their selling prices, in cases of this kind, were not based upon cost and carriage, but were directly affected by competition from points enjoying rates violative of the long and short haul rule. In such cases it may be possible to show damage and that reparation should be awarded. In the case at bar no testimony was offered to show that the rate from San Francisco to Perkins, discriminatory as it clearly was when compared with the rate from San Francisco to Sacramento, and violating the long and short haul rule as it did, had any effect upon the price made by complainant in selling his merchandise to customers in Perkins, and it is therefore fair to assume that complainant based his selling price upon cost and carriage and made his profit, in which event reparation, if due to any one, is due to the people to whom complainant sold his wares and they, in turn, in equity should pass it on to those to whom they sold the merchandise. Such is, of course, impossible, and the state is put to the expense of putting the machinery of this Commission in motion to collect petty reparation from the car-

riers who are not entitled to it, or see that it is paid to shippers as clearly not entitled to it, often under circumstances which indicate that such claims for reparation would never have been filed had it not been for the activities of claim agents who usually receive 50 per cent of the amount recovered, while the consumer, to whom the reparation is due in the last analysis, gets nothing. I do not believe that such was the aim or intent of the law. Undue discrimination must be removed wherever and whenever found; deviation from the long and short haul rule must be justified or discontinued; reparation should be awarded where damage is shown, but I do not believe the time of this Commission should be occupied to the neglect of more important matters in helping to collect reparation for people not entitled to it."

So much for that point which we argue more elaborately in the brief that the failure of the plaintiff in error to allege and prove that its assignors had been damaged by the collection of this rate is fatal in this case.

Now, if the court please, I want to come to the second branch of the case, and that is the class of cases that arose under the amended section of the California Constitution as it was amended and took effect on October 10, 1911. This is a peculiar piece

of legislation. I think it is entirely competent for a constitutional provision to swallow a statute whole, so to speak, but it is a most unusual thing for it to do so. In Article 12, Section 22 of the Constitution, as amended in 1911, quoted on page 6 of the brief of the plaintiff in error, there is first provided in section 21 a long and short haul clause very similar to that of the Interstate Commerce Act, save that it does not continue expressly existing rates in force pending an application to the commission, as the amendment to the Interstate Commerce Act did. It does, however, provide, that the railroad commission may in special cases after investigation authorize a company to charge less for a longer than for a shorter distance. In Section 22, however, it states that no provision of this constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the railroad commission additional powers of the same kind, or different from those conferred herein which are not inconsistent with the powers conferred upon the railroad commission in this constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this constitution.

When the Supreme Court of California came to consider that delegation of power to the Legislature to amend the constitution by Legislative act,—that is practically what it amounts to,—in this same case

I have cited, *Pacific Telephone Company vs. Eshleman*, 166 Cal.—I am reading from page 654, they quote the section I have just read, and they say:

“There is the fullest possible grant of authority, to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the legislature in the commission shall not be inconsistent with the constitutional powers conferred; that this means and can only mean that the legislature may not curtail any of the powers vested by the constitution in the railroad commission, but that the legislative authority, to confer any kind of additional powers is, and is expressly declared to be, ‘plenary.’”

Coming then to the very next paragraph in the section of the constitution, we find that section takes the then existing Act of the Legislature called the Eshleman Act, which took effect in February, 1910, and to use an inelegant expresson, “swallows it whole.” It says:

“The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the railroad commission Act of this State, approved February 10, 1911, shall be construed with reference to this constitutional provision, and any other constitutional provision becoming operat-

ive concurrently herewith, and said Act shall have the same force and effect as if the same had been passed after the adoption of this provision to the constitution, and all other Acts adopted concurrently herewith.”

Now, we turn to the Eshleman Act, which is Chapter 20 of the California Statutes of 1911, and we find there provisions which I think are in point here. First, section 15, which says that the commission shall have power, and it shall be its duty to establish rates of charges for the transportation of freight and passengers. We find next the circumstances under which the commission must give a hearing on the establishment of rates and charges, and that is found in the last paragraph of section 18, and it is the only provision in that Act for a hearing with respect to the establishment of rates. It says:

“The commission may at any time abolish, alter or in any manner amend any rate or classification upon notice and hearing.”

In other words, in one section the commission is told to establish rates, and in the next section, in effect, it is said “you cannot alter, or abolish or in any manner amend any rates without giving the carrier a hearing.”

Then we find, still regarding this Eshleman Act as a part of the constitution, in the beginning of section 18, “*all rates of charges for the transporta-*

ton of passengers and freight, and all classifications established by the commission shall remain in effect until changed by the commission. A substantial compliance by the commission with the requirements of this Act shall be sufficient to give effect to all the classifications, etc., and none of them shall be declared inoperative because of any omission of a technical or clerical character in the establishment of the record or publication of the same."

In thus holding to the inflexibility of commission established rates the framers of the amendment must have had in mind the principles announced in *L. & N. R. Co. vs. Maxwell*, 237 U. S. 94, 36 Supm. Ct. 494. In this case the Court reiterates the rule which it says in another case it has "restated with tiresome repetition:"

"Under the Interstate Commerce Act the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases, but it embodies the policy which has

been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The Act (sec. 6) provides:

‘Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.’ (34 Stat. at L. 587, Comp. Stat. 1913, sec. 8597.)”

The Wright Act, approved March 19, 1909, (Cal. Stat. 1909, p. 499) forbade a transportation company to engage in transportation without filing and publishing its tariffs in accordance with the provisions of the Act, and denied it the right to charge or demand or collect or receive a greater or less compensation than its tariff rates (Sec. 18). This was superseded by the Eshleman Act, effective Feb. 19, 1911, (Chap. 20, Stat. 1911) which in Sec. 17 pro-

vided for the establishment of rates, and in Sec. 18 provided that such rates should remain in effect until changed by the Commission, and in Sec. 22 provided that no railroad company should charge, etc., any greater, less or different rate than the rate established by the Commission.

The California Public Utilities Act, effective March 23, 1912, (Chap. 14, Stat. Special Session 1911) denied by Sec. 17 the right of a carrier to charge, demand, etc., any greater or less or different compensation than the rates specified in the published schedules.)

What was the reason for this I have termed a rather remarkable inclusion of a statute in a constitutional amendment? The reason, in brief, was this: The Legislature of California at the same time it submitted these two amendments to the people for ratification, submitted initiative and referendum amendments. If the initiative and referendum amendments were adopted, as they were, at the same election, the Legislature saw that there was a hiatus there between the adoption of the constitutional amendment, changing in many respects the scheme of rate regulation, and the time when the Legislature could meet, and put a new and amplified act into effect. As a matter of fact the new act which is referred to in the briefs did not go into effect until March 23, 1912, and so they state in effect in the amendment "we do not propose that

if this amendment is adopted these carriers shall be allowed to be foot loose; we do not propose that they shall be without regulation even for a month or two months; we propose that this Eshelman Act shall remain not as an Act of the Legislature, but as a part of the organic law of this State; we propose to hold that Act in effect until the Legislature gives us something different, and we hope, something better." So I say in reading the provisions of the Eshelman Act it is proper to read them not as an Act of the Legislature, but as an integral part of the Constitution itself, and so reading, the provisions, of course, must be read in *pari materia*.

The Supreme Court of the United States has said to a somewhat similar contention to that of counsel here and in United States vs. Louisville & N. R. Co., 235 U. S. 314:

"It has indeed been held that the provisions of sections 2, 3 and 4 of the Act being in *pari materia* required harmonious construction, and therefore they should not be applied so that one section destroyed the others and consequently that a lesser charge for a longer than for a shorter distance permitted by section 4 could not for such reason be held to be either a preference or discrimination under section 2 or 3."

Now there is a further reason, if your honors please, why this Eshleman Act, holding as I have shown in section 18 that the rates established by the commission, should continue in effect, until changed by the commission, shall have been so included in the constitutional enactment, and that reason is a practical reason, and one which of necessity must have appealed to the Legislature. That reason is, that to have done otherwise would have thrown the rate structure of the railroads of California into utter chaos. There were hundreds, yes, thousands of cases in California at that time where the railroad commission had established rates and approved tariffs which violated the old long and short haul clause of the California constitution. Counsel says in his briefs, and at least would say in his argument if he was called upon to discuss that point that the rates established by the commission under the old section of the constitution so far as they related to through movement were legally established, but that so far as they permitted the charging of higher intermediate rates, they were not permitted by the constitution and were, therefore, void. What would be the result? Let us take a concrete illustration. The rate on rice established by the commission prior to October 10, 1911, as shown by the record in this case, was, I think, 27½ cents per hundred pounds from San Francisco to Los Angeles. The rate on rice to

Fresno was, I believe 38 cents per hundred pounds, at least, it was more than the through rate. It was an apparent violation of the old long and short haul clause, if you take it as an isolated clause under the old constitution, and do not construe it in *pari materia* with the other clauses. What was the result, according to counsel's contention? October 10th comes along and irrespective of whether your honors may find that the 27½ cent rate and the 36 cent rate were legally established on October 10, 1911, whether you find for the railroad company or against it, on the first class of the counts in this action the fact remains that on October 10, 1911, according to counsel's own admission, there was at least one legal rate there, and that was the 27½ rate to Los Angeles, which we claim is compelled by competitive conditions. Counsel says that rate should be observed as a maximum to intermediate points. Think what utter confusion would result if at one fell swoop by a constitutional enactment all of the intermediate rates, no matter whether carrier made or commission made, are wiped out, and the carrier was told under the constitutional provision to charge the through rate, but no more, to any of its intermediate points. Could it be that the Legislature in submitting this to the people contemplated any such condition of affairs? Any such condition that would inevitably disrupt traffic and business conditions and make it impossible for a

shipper or a receiver of freight to tell what the railroad in its sweet will would charge him at any intermediate point between San Francisco and Los Angeles.

It is true, as we suggest in our supplemental brief, and as counsel refers to in his supplemental brief that if the railroad without commission authority charged John Smith more for transporting rice from San Francisco to Fresno than it charges James Brown it would be guilty of discrimination under the Eshleman Act. That is perfectly true, but is that an answer? Can it be said that the Legislature in submitting this amendment to the people, or that the people in adopting this amendment could have contemplated that the railroad, subject only to the penalties prescribed in the Act, might discriminate, might charge one man 28 cents for rice to Fresno, another man 25 cents, another 24 cents and another 15 cents, so long as it did not exceed the 27½ cents rate? That is what counsel's argument inevitably leads to. It goes to the point that the through rates established by the commission and in effect on October 10, 1911, were reasonable, but that the intermediate rates were void in so far as they exceeded the through rate.

I say the Legislature in adopting the provisions of the Eshleman Act, which provided that all rates of charges for transportation of freight and passengers should remain in effect until changed by the commission designedly intended to preserve the

status quo. They did not intend, of course, indefinitely to permit the carriers where unjustified circumstances existed to defy the principle established by the long and short haul clause, but they did intend to give the commission the opportunity of adjusting whatever difference might be called to its attention.

The commission did act in this matter as counsel admits, but he argues in his brief that the action of the commission was not effective action. He predicates that first on the language of the orders entered by the commission, and second on the language of the constitution itself. Now, the amendment to the constitution says that this long and short haul clause shall be operative except in special cases and upon application and after investigation by the commission; and for the moment I wish to devote my attention and that of the court, to the question of what "investigation" means as used in the statute. On page 113, 114 and 115 of our opening brief we cite a number of cases to the point that investigation as used in a statute of this kind does not require the formality and solemnity of a court of record, that while a commission may have judicial powers that the term "investigation" is not as broad as the term "hearing." There are no adversary parties in an investigation of that kind because the commission is sitting, presumably, as representing the shippers and the people. It is not an ad-

versary proceeding. I find in addition to those authorities some considerable support for that position. Section 17 of the Act to regulate commerce provides that the commission may conduct its proceedings in such manner as will best tend to a proper discharge of business, and to the interests of justice. In *New York C. & H. R. R. Co. vs. ICC*, 168 Fed. 131, 138, 139, and in *Philadelphia and Reading Ry. Co. vs. United States*, 219 Fed. 988, this provision of the Interstate Commerce Act is discussed. I will not take the time of the court to read the cases, but I think they sustain my view, that the word "investigation" means not a public hearing, but any investigation which the commission may see fit to make precedent to a relieving order, especially in cases where no notice is necessary and there are no adversary parties, notice having been waived by the carrier by filing the application, and no notice to any one else being necessary.

But these orders to which I shall very shortly refer were made while the Eshleman Act was in effect. That Act, as I have shown, was not only an Act of the Legislature but had been adopted bodily by the State Constitution, the construction of that adoption having been passed upon by the Supreme Court of California in the telephone case, I have cited here. The Eshleman Act, Chapter 20, Statutes of 1911, on page 13, requires the establishment of rates and a hearing only when the rate or

classification is abolished, altered or in any way amended, because under section 15 the commission is given the power to establish rates and charges for the transportation of freight. I suppose the necessary qualification would exist there, that that power cannot transcend Federal constitution limitations. That is involved in another branch of the case which is covered by the briefs, and I do not care to confuse this argument by further referring to it.

Section 17 of the Eshleman Act provides that a substantial compliance by the commission with the requirements of the Act shall be sufficient to give effect to all of its orders, and that none of them shall be declared inoperative because of any omission of a technical or clerical character in the establishment, record or publication of the same.

The commission on October 26, 1911, when the news of the adoption of the amendment became authentic directed an order to the carriers, which your honors will find beginning on page 399 of Volume 2 of the printed record. This order directed the carriers before January 2, 1912 to present to the commission for examination and investigation a new schedule or schedules removing deviation from the provisions of the long and short haul clause. Following that on November 20, 1911, the commission issued another order in which it said—this will be found on page 404 of Volume 2 of the printed record:

“Permission is hereby granted to railroads and other transportation companies until January 2nd, 1912, to file for establishment with the commission in the manner prescribed by law and in accordance with the commission’s regulations, such changes in rates and fares as would occur in the ordinary course of their business, continuing, under the present rate bases or adjustments, higher rates or fares at intermediate points; provided, that in so doing the discrimination against intermediate points is not made greater than that in existence October 10th, 1911, except when a longer line or route desires to reduce rates or fares to the more distant point for the purpose of meeting by a direct haul reduction of rates or fares made by the shorter line.”

Then the commission says that it does not hereby indicate it will finally approve any rates and fares that may be filed under this permission or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2nd, 1912. The intention of the commission with respect to this order is clearly set forth in its opinion in the Phoenix Milling Co. case, copy of which is printed herewith.

Now, between that date and January 2nd, 1912, the Southern Pacific Company filed with the commission certain formal applications verified and in the form prescribed by the commission in its order of October 21, 1912. This series of applications begins at page 407, Volume 2 of the printed record, and covers all of the second class of counts here involved.

On January 2nd, 1912, a hearing was had. No evidence was introduced at the hearing. That appears from the record. It was simply continued. On January 16th, 1912, the commission made another order, which appears on page 425 of Volume 2 of the printed record:

“Until February 15, 1912, the railroad and other transportation companies may file for establishment with the commission in the manner prescribed by law and in accordance with the commission’s regulations such changes in rates and fares as would occur in the ordinary course of their business, continuing under the present rate bases or adjustments, higher rates or fares at intermediate points.”

We claim for this series of orders two things. We claim, first, that under the power vested in the commission by the Eshleman Act, which provides that it can fix a rate without a hearing whenever it does not change or abolish or alter the rate, these orders operated as rate fixing orders, and that of

necessity that is so because it carries out the scheme and plan of the Legislature to preserve the status quo of commercial conditions and railroad rates in California, pending the time when the commission might investigate and pass upon these thousands and thousands of rates violative of the long and short haul clause.

We claim in the second place that these orders, particularly the order of January 16, 1912, because that order came after the applications had been made by the company, that either or both of these orders operated as a permission by the commission to continue the existing discrimination, if you care to call it such, or the existing conditions under which we were charging more for the shorter than for the longer distance.

Referring again to the Phoenix Milling Company case and referring again to the proposition that this commission is a judicial body, that its powers within its jurisdiction are almost co-equal with those of the Supreme Court, I desire to call attention to what the commission itself determined in the Phoenix Milling Company case.

“The commission’s order of October 28, 1911, in the long and short haul proceeding issued under authority of section 21, Article XII, of the Constitution as amended on October 10, 1911, and in pursuance of which the defend-

ant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing, or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order the carriers were impliedly granted permission for practical reasons to maintain the status quo until the commission passed upon their application. By a subsequent order issued November 20, 1911, in the same proceedings *express permission so to do was given.*

I respectfully submit to your honors that if you were sitting in the position of those commissioners, and realized the consequences which would result, which I have inadequately endeavored to depict here, by wiping out at once all of the intermediate rates in the state which violated the long and short haul provisions, and turning the carriers loose to do as they pleased with regard to those intermediate rates, subject only to the penalties for discrimination, I feel in respect for the court and its judgment your honors would have done exactly the same thing as the commission did, and believed it could do, preserve the status until the commission could investigate these thousands of rates and avoid disturbing business conditions, and allowing the situation to arise which we have here.

Counsel complains in his supplemental brief that his clients, California Adjustment Company were not notified with regard to any of the proceedings. I do not conceive that it is any more incumbent upon the California Railroad Commission to notify every collection corporation in the State—I do not use the term in any offensive sense—any more than it is upon this court to call upon counsel to file briefs as *amicus curiae*. The proceeding, as I have said, is not what we commonly term an adversary proceeding. It is vested in the commission as such to represent the shippers and receivers of freight. We find they do take that stand, sitting partly as a judge partly as an advocate, partly as a jury, and sometimes as executioner so when the carriers filed an application, and the matter came before the commission there was no necessity for going out into the highways and byways and calling in every one and making an adversary proceeding out of that is delegated to the discretion of the commission.

I feel that upon this second branch of the case I have already too long trespassed upon your honors' patience, but I feel as I said in the beginning, that in the mass of briefs filed it may be that the proposition has been lost sight of, that this constitutional amendment adopted the act bodily and that the only way you can give that amendment proper effect is to take the amendment and the act and construe them together, trying to find out what the Legislature

really intended and tried to do, for when we find out what the evils are against which the legislation is directed, we can usually find the intention of the Legislature.

(Then followed oral argument by counsel for defendant in error.)

NOTE.

As this, by permission of the Court, is in effect though not in form, a supplemental brief, we desire briefly to comment on the closing argument of counsel for defendant in error, made May 24, 1916.

1st—We are content to leave the question of whether it is necessary to plead and prove damages, which counsel denies, to the cases cited in the briefs and oral arguments.

2nd—Counsel does not answer our argument to the effect that the Legislature, by making the Eshleman Act a part of the Constitution, intended to prevent the business confusion and chaos of common-carrier rates which would have resulted on October 10, 1911, if the carriers had immediately been allowed to charge anything they pleased for the intermediate rate, so long as they did not exceed the through rate established by the Commission and already in effect.

3rd—Counsel referred in his argument to the case of Merchants & Manufacturers Traffic Association of Sacramento et al vs. United States et al, District

Court, Northern District of California, Second Division, decided December 15, 1915, reported in 231 Fed., beginning at page 292, in which, by a divided Court, it was held that the Interstate Commerce Commission had not given certain Long and Short Haul Clause applications the investigation required by the amendment of June 18, 1910, to the Fourth Section of the Interstate Commerce Act. We beg to call the Court's attention to the fact that in that case the United States Supreme Court granted a writ of supersedeas in April, 1916, and that the issues there involved are now before that Court for determination. Counsel is in error when he states that there was no difference of opinion among counsel, and no question, so far as the regularity of the Commission's investigation was concerned. That is one of the main questions in the case, and to the writer's knowledge is one of the questions which was relied upon by counsel for the Interstate Commerce Commission and for the railroad carriers in presenting their application to the Supreme Court in April for a writ of supersedeas.

4th—Counsel's illustration of what would happen if a carrier started in business after October 10, 1911, and endeavored to make greater charges for the shorter than for the longer distance, is we think rather unfortunate for his contention here. It is clear that under the provisions of the amended Constitution and the Eshleman Act, which was made

a part of the Constitutional amendment the carrier should not engage in business at all without having its rates fixed by the Commission. The Commission might do so under the Act, *sua sponte*, and the rates so established would be the actual moving rates of the carrier, subject only to the right of the carrier to complain that they deprived it of property without due process of law, or violated some other provision of the Federal Constitution; or the carrier might, as it probably would in the case supposed by counsel, go to the Commission with a schedule of rates which it thought was reasonable and just, and ask the Commission to adopt those rates, or such modification thereof as the Commission might think proper.

Manifestly it could not be contended in either of these events that if the Commission, either of its own volition or upon application of the carrier, fixed rates for the carrier newly engaging in business, which rates violated the Long and Short Haul Clause, a right for reparation or damages would arise on behalf of persons who were charged more for the lesser than for the greater distance, merely because the carrier had not made application stating that the case was a special case, and because the Commission had not, after investigating that special case with all the formality of a Court investigation, granted relief from the operation of the clause.

In other words, the fixing of the new rates by the Commission would in itself presuppose an investigation by the Commission, since with the Commission is lodged abundant information in the shape of tariffs, schedules, etc., by which it can determine whether to exercise its discretion in a given case. The Commission is the representative of the public, and if the carrier does not complain the public cannot complain. This principle, as we have stated a number of times in briefs and oral arguments, is one of the principles upon which the orders of the Commission entered after October 10, 1911, preserving the status quo, may be sustained as rate-fixing orders under the provisions of the Eshleman Act giving the Commission the power to fix rates without a hearing, and requiring a hearing only where a rate is changed, altered or amended, irrespective of what effect may be given them as exercise of a power solely referable to the long and short haul section.

5th—We ask the Court not to lose sight of the fact that as to all of these counts it was pleaded in the first further and separate defense (Record, Vol. II, p. 337-8) that to force collection of the through rate at the intermediate point would be to require defendant to establish such intermediate rates at less than a reasonable compensation for the services performed, and in the eleventh further and separate defense that the rates charged and collected were just and reasonable.

To these defenses general demurrers were sustained (Record, Vol. II, p. 356). The Court refused to permit testimony thereon (Record, Vol. II, p. 448). Error is duly assigned as to the sustaining of the demurrer (Record, Vol. II, p. 453) and as to the rejection of the testimony (Record, Vol. II, p. 531).

In this the District Court, we think, was clearly in error.

The case is one of attacking what is claimed to be an attempt by the State to single out certain limited classes of freight and compel them to be carried for unremunerative or less than reasonable rates.

If it be true that the inflexible operation of the long and short haul clause before October 10, 1911, or its automatic operation on that date, had that effect we think that defendant was entitled to show it.

The following cases are authority:

Northern Pacific vs. North Dakota, 236 U. S. 585; 35 Supm. Ct. 429:

“But a different question arises when the state has segregated a commodity, or a class of traffic, and has attempted to compel the carrier to transport it at a loss or without substantial compensation, even though the entire traffic to which the rate is applied is taken into account.

On that fact being satisfactorily established, the presumption of reasonableness is rebutted. If in such a case there exists any practice, or what may be taken to be (broadly speaking) a standard of rates with respect to that traffic, in the light of which it is insisted that the rate should still be regarded as reasonable, that should be made to appear. As has been said, it does not appear here. Frequently, attacks upon state rates have raised the question as to the profitableness of the entire intrastate business under the state requirements. But the decisions in this class of cases furnish no ground for saying that the state may set apart a commodity or a special class of traffic and impose upon it any rate it pleases, provided only that the return from the entire intrastate business is adequate.

* * * * *

“To repeat and conclude: It is presumed—but the presumption is a rebuttable one—that the rates which the state fixes for intrastate traffic are reasonable and just. When the question is as to the profitableness of the intrastate business as a whole under a general scheme of rates, the carrier must satisfactorily prove the fair value of the property employed in its intrastate business, and show that it has been denied a fair return upon that value. With respect to particular rates, it is recognized that

there is a wide field of legislative discretion, permitting variety and classification, and hence the mere details of what appears to be a reasonable scheme of rates, or a tariff or schedule affording substantial compensation, are not subject to judicial review. But this legislative power cannot be regarded as being without limit. The constitutional guaranty protects the carrier from arbitrary action and from the appropriation of its property to public purposes outside the undertaking assumed; and where it is established that a commodity, or a class of traffic, has been segregated and a rate imposed which would compel the carrier to transport it for less than the proper cost of transportation, or virtually at cost, and thus the carrier would be denied a reasonable reward for its service after taking into account the entire traffic to which the rate applies, it must be concluded that the state has exceeded its authority."

The companion case to *Northern Pacific vs. North Dakota* is *Norfolk & Western vs. Conley*, Attorney-General of West Virginia, 236 U. S. 605; 35 Supm. Ct. 437:

"The fundamental question presented is whether the validity of the passenger rate can be determined by its effect upon the passenger business of the company, separately considered.

What has been said in the opinion in *Northern Pacific R. Co. vs. North Dakota*, decided this day (236 U. S. 585, 59 L. Ed. 429, 35 Supm. Ct. 429), makes an extended discussion of this question unnecessary. It was recognized that the state has a broad field for the exercise of its discretion in prescribing reasonable rates for common carriers within its jurisdiction; that it is not necessary that there should be uniform rates or the same percentage of profit on every sort of business; and that there is abundant room for reasonable classification and the adaptation of rates to various groups of services. It was further held that, despite this range of permissible action, the state has no arbitrary power over rates; that the devotion of the property of the carrier to public use is qualified by the condition of the carrier's undertaking that its services are to be performed for reasonable reward; and that the state may not select a commodity or class of traffic, and instead of fixing what may be deemed to be reasonable compensation for its carriage, compel the carrier to transport it either at less than cost, or for a compensation that is merely nominal."

Respectfully submitted,

HENLEY C. BOOTH,

GEORGE D. SQUIRES,

FRANK B. AUSTIN,

Attorneys for Plaintiff in Error.

SUPPLEMENT.

NOTE. The following is a copy of a certified copy of the decision of the California Railroad Commission in the Phoenix Milling Company case, referred to in the oral argument, the certified copy being filed with the original of this brief.

The reason for filing the certified copy is that in the printed copies that came out of the State Printer's office the order of the Commission of November 20, 1911, was referred to as November 20, 1912. The typographical error has been corrected in the Commission's office, as will appear from the certified copy herewith.

*Before the Railroad Commission of the State
of California.*

Phoenix Milling Company vs. Southern Pacific Company. Case No. 762. Decided July 23, 1915.

George J. Bradley, for Complainant.

George D. Squires, for Defendant.

REPORT OF THE COMMISSION.

LOVELAND, *Commissioner*.

The complainant in this proceeding is a corporation engaged in the handling of grain, meal and flour, and its principal place of business is at Sacramento. In its petition filed January 25, 1915, the complainant alleges that during the period from December 6, 1912, to February 24, 1914, there was shipped to it at Sacramento via defendant's line certain less-than-carload shipments of meal from San Francisco, on which there was charged and collected by defendant a rate of 16 cents per 100 pounds which was the fourth class rate then applying between San Francisco and Sacramento and which is still in effect. The complainant further alleges that at the time these shipments were made the defendant published and maintained a commodity rate of 13 cents per 100 pounds on meal in less-than-carload lots from San Francisco to Perkins, a point beyond Sac-

ramento on defendant's Placerville branch, and the complainant contends that the charging of a higher rate to Sacramento than was contemporaneously in effect to Perkins subjected it to an undue discrimination and was in violation of the provisions of the Constitution and the Public Utilities Act prohibiting a greater charge for the transportation of property for a shorter than for a longer distance over the same line or route in the same direction. Reparation in the sum of \$8.17 is asked, together with interest from the date of its collection.

While it is admitted by the defendant that the rates alleged to have been charged were in violation of the long and short haul provision of the Constitution it avers that prior to the time of the movement of the alleged shipments that it had made application to the Commission, in pursuance to the provisions of section 21 of article XII of the Constitution empowering the Commission upon application and in special cases after investigation to grant authority to deviate from the long and short haul rule, for a waiver of said provisions as to the rates from San Francisco to Perkins and other points on the Placerville branch, and that until that application was acted upon by the Commission the defendant was protected in its violation of that provision and that reparation should not be

awarded therefor. This is true in part, but only in part, for the reason that while this Commission, under its order of November 20, 1912, gave carriers permission to maintain the *status quo* existing at the time the Constitution was amended following the procedure of the Interstate Commerce Commission in similar matters, for practical reasons no guarantee was extended to the defendant by either the provisions of the Constitution or by order of this Commission that it would be excused for violating the long and short haul rule if, upon investigation, such deviation was not found reasonable or permissible.

Defendant denies that this complainant received the shipments alleged to have been received by it, or that it paid the freight charges thereon, or any part thereof, or that any of the rates mentioned in the complaint discriminated against complainant, or that complainant was damaged by the payment of freight charges alleged, or is entitled to an award of reparation.

Defendant's denial that complainant made the shipments alleged to have been made need not be considered seriously, as it was probably made on account of lack of information, and no testimony was offered at the hearing in support of such denial, whereas counsel for complainant at the hearing introduced a statement

of shipments and stated that complainant had, in his possession, the paid freight bills as evidence that these shipments were made and the freight charges collected.

The questions whether the rates mentioned in the complaint discriminated against the complainant or whether complainant was damaged by the payment of freight charges alleged, and was consequently entitled to an award or reparation, are the questions which the Commission is called upon to decide in this case.

The rate of 13 cents per 100 pounds on meal in less-than-carload lots from San Francisco to Perkins was originally published and filed in so far as the record of the Commission indicates, in defendant's Placerville Commodity Tariff No. 1, C. R. C. 113, which became effective on August 28, 1906, and was continued in effect in that or other publications as a non-intermediate rate until April 12, 1914, on which date it was made to apply as a maximum to intermediate points. During the entire period from December 6, 1912, to April 12, 1914, there was no commodity rate on meal in less-than-carload lots from San Francisco to Sacramento, and the class rate applying thereon was 16 cents per 100 pounds. Therefore, during the period in which it is alleged the shipments herein involved were made and until April 12, 1914, the rate from San Francisco to Sacramento, as

compared with the rate from San Francisco to Perkins, was in violation of the long and short haul provision prohibiting the charging of a greater rate for a shorter than for a longer haul over the same line or route in the same direction. The record also discloses that the defendant, in pursuance to an order of the Commission issued on October 26, 1911, in Case 214, the long and short haul investigation, filed with this Commission on December 30, 1911, an application (Southern Pacific No. 59 in Case 214) asking authority generally to continue rates for the transportation of property from San Francisco to Perkins and points on the Placerville branch, as shown in its Placerville Commodity Tariff No. 1, C. R. C. No. 113, lower than the rates concurrently in effect from or to intermediate points. While the rate on meal to Perkins was not specifically mentioned or Sacramento specified in the application as an intermediate point to which it desired to continue a higher rate on meal than it concurrently maintained to Perkins, the terms of the application were general and the illustrations therein set out were merely typical of the general adjustments of rates from San Francisco to points on the Placerville branch as to which it sought authority to disregard the long and short haul rule. Thus the application provided that the illustrations therein set out

“outlines in a general way the adjustment of rates covered by tariff C. R. C. No. 13 and is in the nature of an explanation of the general features where rates do not conform to section 21, article XII of the Constitution of California as amended October 10, 1911”;

also that

“there are instances other than those specifically mentioned in this petition in which the charges are greater in the aggregate for the transportation of like kinds of property for the shorter than for the longer distance over the same line or road in the same direction, the shorter being included within the longer distance but it is not practicable to state them all in detail in this petition and it is the desire of your petitioner to continue such rates in force as in said tariff provided reference hereby being made to said tariff for further details and particulars as to said rates.”

In view of the terms of the application it is my opinion that it should be construed as a general application for relief from the long and short haul provision of the Constitution as to *all* rates in defendant's so-called Placerville Commodity Tariff C. R. C. No. 116, and which included the less-than-carload rate on meal from San Francisco to Perkins.

In defense of this adjustment, the Southern Pacific Company, in the long and short haul investigation, contended that the rates from San Francisco to points on the Placerville branch were made lower than the rates to intermediate points because of the competition of carriers by water operating between San Francisco and Sacramento. In the case at bar, the same justification was offered and it was also said that the competition of boat lines between San Francisco and Sacramento and teams thence to points on the Placerville branch, forced the defendant to maintain to these points lower rates than to intermediate points. While there might have been sufficient reason on these grounds for the non-observance of the long and short haul rule as to rates from San Francisco to intermediate points south of Sacramento not located on navigable waters, it is obvious that such a reason would not justify a higher rate from San Francisco to Sacramento than from San Francisco to Perkins or other points on the placerville branch, as the competition of the carriers by water, if there was any, was between San Francisco and Sacramento, and it was that very competition which was reflected to the points on the Placerville branch that induced the carrier to establish to those points lower rates than it would have established had

it not existed. This being so, there appears no reason why the rail rates from San Francisco to Sacramento should not have been as low, if not lower, than the rail rates from San Francisco to Perkins, and in my opinion, the conclusion that Sacramento was discriminated against by the adjustment is unavoidable. Nor is it seriously contended by the defendant that the maintenance of lower rates from San Francisco to points on the Placerville branch than to Sacramento was justified by the dissimilarity of the transportation conditions at the more distant points, and Mr. Butler, assistant general freight agent of defendant, stated at the hearing (see transcript, page 19) that he did not defend the Placerville tariff and the fact that defendant, on April 12, 1914, canceled the non-intermediate application of the rate to Perkins shows that defendant agrees with the Commission in this view.

As to team competition from Sacramento to points on the Placerville branch, which probably did exist at one time, owing to the fact that teams came into Sacramento loaded and would be willing to take a load back, it was not seriously urged that such competition now exists, and even if there were such competition today, it would seem to justify a lower rate

from Sacramento to Perkins on shipments originating at Sacramento as well as on shipments originating at San Francisco.

The complaint made no showing that the rates charged were unreasonable *per se* or discriminatory in any other respect than that they were violative of the long and short haul.

There is no doubt in my mind that such rates violated the long and short haul and kere discriminatory under that rule.

The Commission's order of October 26, 1911, in the long and short haul proceedings (Case 215) issued under authority of section 21, article XII of the Constitution as amended on October 10, 1911, and in pursuance to which the defendant's application was filed, directed the carriers to remove all violations of the long and short haul provisions then existing or in the event it was desired to justify the same or any of such violations, to file applications specifying the particular violations they desired to continue. By this order the carriers were impliedly granted permission for practical reasons, to maintain the *status quo* until the Commission passed upon such application. By a subsequent order issued on November 20, 1911, in the same proceeding, express permission to do so was given. The Commission did not, however, by these orders sanction or approve any of the rates

covered by the defendant's application which were in violation of the long and short haul provision. In fact, it expressly withheld its approval of such rates. Therefore, in my opinion, the filing of the application for relief from the long and short haul provision and the permission of the Commission to maintain the *status quo* did not operate to extend to the carrier immunity from reparation during the pendency of said application if the higher rates charged to the intermediate points were thereafter found to be unreasonable or discriminatory and if, in the Commission's opinion, reparation was due. In this respect the rates covered by the application were no different from rates filed in tariffs and which are subject to complaint and the Commissions' power to award reparation.

On April 12, 1914, the defendant made the rate to Perkins applicable to all intermediate points and thereby presumptively established that rate as a just and reasonable rate to Sacramento. This resulted in a discontinuance of the deviation from the long and short haul rule and removed the discrimination therefore appearing in the rates complained of. The question for the Commission to decide is, shall the defendant be required to pay reparation in this case?

I have no hesitation in declaring my conviction that reparation should be awarded where complainants can show that the application of rates, violative of the long and short haul rule, has resulted in damage to complainants. I do not believe that the carriers should be required to pay reparation to a complainant who has not been damaged when it is evident that such reparation can not be passed on to those who are entitled to it, but rather, that complainant will keep it as additional profit.

There may be instances where complainants will be able to show that their selling prices, in cases of this kind, were not based upon cost and carriage, but were directly affected by competition from points enjoying rates violative of the long and short haul rule. In such cases it may be possible to show damage and that reparation should be awarded. In the case at bar no testimony was offered to show that the rate from San Francisco to Perkins, discriminatory as it clearly was when compared with the rate from San Francisco to Sacramento, and violating the long and short haul rule as it did, had any effect upon the price made by complainant in selling his merchandise to customers in Perkins, and it is therefore fair to assume that complainant based his selling price upon cost and carriage and made his profit, in which event reparation, if due to any

one, is due to the people to whom complainant sold his wares and they, in turn, in equity should pass it on to those to whom they sold the merchandise. Such is, of course, impossible, and the state is put to the expense of putting the machinery of this Commission in motion to collect petty reparation from the carriers who are not entitled to retain it, or see that it is paid to shippers as clearly not entitled to it, often under circumstances which indicate that such claims for reparation would never have been filed had it not been for the activities of claim agents who usually receive 50 per cent of the amount recovered, while the consumer, to whom the reparation is due in the last analysis, gets nothing. I do not believe that such was the aim or intent of the law. Undue discrimination must be removed wherever and whenever found; deviation from the long and short haul rule must be justified or discontinued; reparation should be awarded where damage is shown, but I do not believe the time of this Commission should be occupied to the neglect of more important matters in helping to collect reparation for people not entitled to it.

The criticism as to the manner in which such claims are some times brought does not apply to this case, which was instituted by Mr. Bradley, who is regularly employed by the

members of a large and important association to look after their interests, and if complainant in this case can show that his selling price was not based upon cost and freight, and that he was damaged, he should be allowed to do so, and reparation awarded for damages shown.

The conclusions herein reached are in accord with the opinion of the Interstate Commerce Commission in *Appalachia Lumber Co. vs. L. & N. R. R. Co.*, 25 I. C. C. 193. In that case the Commission said:

“It would be inconsistent to grant reparation for a disregard of the rule of the fourth section during that period within which the law making authority had expressly sanctioned existence of such disregard.”

And that

“No damages can be given up to the time when the Commission passes under these fourth section applications unless possibly a case is made out under the third section which carries with it an award of damages or unless under the first section the rate to the intermediate point has been found unreasonable.”

The facts in that case, however, and the provisions in section 4 of the Interstate Commerce Act are essentially different from the facts in this case and the provisions of the Public Utilities Act applicable in this proceeding. It

does not appear that the defendant in the Apalachia case, subsequent to the filing of its application for relief from the fourth section of the Interstate Commerce Act, removed the discrimination against the intermediate points by establishing the rate to the more distant point as a maximum to the intermediate point and thereby admitted the reasonableness of that rate for the shorter haul.

This case, like all others heard and decided by the Commission, must rest upon the peculiar statement of facts applicable to it and under all the circumstances of the case I find the application for an award of reparation must be denied.

I submit the following form of order:

ORDER.

This case being at issue upon complaint and answer duly filed, and a public hearing having been held, and the matters and things involved in the case thoroughly considered, and the Commission having found that the rate herein complained of was discriminatory and violative of the long and short haul rule, but that such discrimination had been removed, and such deviation from the long and short haul rule discontinued, and that under the circumstances of the case the application for an award of reparation should be denied.

It is hereby ordered that such application for an award for reparation be, and it is hereby, ordered, and the case dismissed without prejudice.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission.

Dated at San Francisco, California, this 22d day of July, 1915.





